91

Supreme Court, U.S.
FILED
071343 APR 15 2008
OFFICE OF THE CLERK

No. (2)

Supreme Court of the United States

STEPHEN DIBBS,

Petitioner, pro se,

-against-

PAUL ROLDAN, Commissioner, New York State Division of Housing and Community Renewal, (the **"DHCR")**
JOHN MULHOLLAND, administrator, DHCR,
DENNIS RYAN, Commissioner,DHCR
BUILDING INSPECTORS of New York City Department of Housing Preservation and Development, (**"HPD"**)
JERILYN PERINE, Commissioner, HPD,
PATRICIA LANCASTER, Commissioner, New York City Department of Buildings ("DOB"),
KENNETH PODZIBA, Commissioner, New York City Board of Standards and Appeals ("BSA"),
TEN BE OR NOT TEN BE, INC., (landlord), TIM GREENFIELD-SANDERS (landlord), LAWRENCE PINNER (Landlord's architect),
JOAN LOBIS,CAROL HUFF, EILEEN BRANSTEN, New York State Supreme Court Judges,

Respondents

On Petition for Writ of Certiorari to the United States Court of Appeal for the Second Circuit

APPENDIX FOR WRIT OF CERTIORARI

Stephen Dibbs, pro se
P.O. Box 2148
New York, N.Y., 10009
(212) 674-5559

05-6807 SDNY(New York City)
Dibbs v Roldan 03-cv-913
Pitman, Henry (tri)
Sprizzo, John (trj)
UNITED STATE COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY ORDER

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 28th day of November, two thousand and seven.

PRESENT:
HON. RALPH K. WINTER
HON JOHN M. WALKDER, JR.,
HON. GUIDO CALABRESI
Circuit judges,

STEPHEN DIBBS,
Counter-Defendanat,

v. No. 05-6807-cv

Paul A. Roldan, New York Division of Housing & Community Renewal, JOHN MULHOLLAND NEW YORK STATE DIVISION OF HOUSING& COMMUNITY RENEWAL, DENNIS RYAN, COMMISSIONER, VARIOUS UNSPECIFIED BUILDING INSPECTORS, JERILYN PERINE COMMISSIONER OF NEW YORK CITY DEPARTMENT OF BUILDINGS, PATRICIA LANCASTER, COMMISSIONER OF NEW YORK CITY DEPARTMENT OF BUILDINGS, KENNETH PODZIBA, COMMISSIONER OF NEW YORK CITY

BOARD OF STANDARDS AND APPEALS, LAWRENCE PINNER, LANDLORD'S ARCHITECT, JOAN LOBIS, NEW YORK STATE SUPREME
COURT JUDGE, CAROL HUFF, NEW YORK STATE
SUPREME COURT JUDGE, EILEEN BRANSTEN, NEW YORK SUPREME COURT JUDGE,

Defeendants-appellees,

TEN BE OR NOT TEN BE, INC., TIM GREENFIELD-SANDERS

Counter-Claimants,

STEPHEN DIBBS,

Counter-Defendant

FOR APPELLANT: STEPHEN DIBBS, pro se, New York

N.Y.

FOR APPELLEES: CECELIA CHANG, Assistant Solicitor General for Andrew M. Cuomo, Attorney General of the State of New York (Barbara D. Underwood & Benjamin N. Gutman, of councel) New York, N.Y.

UPON DUE CONSIDERATION, of this appeal from a judgment of the United States District Court for the Southern District of New York, (Sprizzo,J.) it is **hereby ORDERED, ADJUDGED AND DECREED**, that the judgment of the district court is **AFFIRMED**. Defendant-Appellee Pinner's motion to

withdraw from the appeal is **DISMISSED AS MOOT.**

Stephen Dibbs appeals from a judgment of the United States District Court for the Southern District of New York entered on October 6, 2005. Judge Sprizzo dismissed Dibbs' complaint in its entirety for failure to state a claim upon which relief could be granted against any of the defendants.

We affirm, substantially for the reasons stated in the thorough and well-reasoned opinion of the court below. Insofar as the decision of the Supreme Court in Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280 (2005), may have raised new questions with respect to the applicability on the Rooker-Feldman doctrine to Dibbs' Takings claim, the district court's conclusion is, in any case, fully supported by the New York preclusion law. See Hoblock v Albany County Bd. Of Elections, 422 F.3f 77, 94 (2d Cir 2005).

The judgment of the district court is AFFIRMED. Defendant-Appellee Pinner's motion to withdraw from the appeal is DISMISSED AS MOOT.

For the Court,
CATHERINE O'HAGAN WOLFE, Clerk of the Court

By: [illegible signature]

356 F. Supp. 2d 340, *; 2005 U.S. Dist. LEXIS 2280, **

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

STEPHEN DIBBS,

Plaintiff pro se,

-against-

03civ0913(JES)
MEMORANDUM ORDER
AND OPINION

PAUL ROLDAN, Deputy Commissioner, New York State Division of Housing and Community Renewal, JOHN MULHOLLAND, administrator, New York State Division of Housing and Community Renewal, NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL, DENNIS RYAN, Commissioner, New York State Division of Housing and Community Renewal, VARIOUS unspecified BUILDING INSPECTORS of New York City Department of Housing Preservation and Development, JERILYN PERINE, Commissioner, New York City Department of Housing Preservation and Development, PATRICIA LANCASTER, Commissioner, New York City Department of Buildings, KENNETH PODZIBA, Commissioner, New York City Board of Standards and Appeals, TEN BE OR NOT TEN BE, INC., (landlord), TIM GREENFIELD-SANDERS (landlord), LAWRENCE PINNER (landlord's architect), JOAN LOBIS, New York Supreme Court Judge, CAROL HUFF, New York Supreme Court Judge, EILEEN BRANSTEN, New York Supreme Court Judge,

Defendants.

----------x

SPRIZZO, D.J.:

Plaintiff pro se Stephen Dibbs ("plaintiff" or "Dibbs ") brings the above-captioned action against employees of various New York City and New York State administrative agencies, the agencies themselves, three justices of the New York State Supreme Court, New York County, his landlord, and an architect in the employ of his landlord, pursuant to the Civil Rights Act, 42 U.S.C. ß 1983, and the Racketeer Influenced and Corrupt Organization Act ("RICO"), 18 U.S.C. ßß 1961-68, seeking declaratory and injunctive relief in addition to damages and a mandamus. Defendants move to dismiss plaintiff's Complaint pursuant to Fed. R. Civ. Pro. 12(b)(1) and (6), and plaintiff cross-moves for an order staying the federal court proceedings. For the reasons set forth below, the Court dismisses the Complaint against all moving defendants. 1

FOOTNOTES

1 Landlord defendants Ten Be or Not Ten Be, Inc. and Tim Greenfield-Sanders have not moved to dismiss plaintiff's Complaint as of this time and the Complaint therefore is not dismissed against them.

BACKGROUND

The following facts are taken from plaintiff's Complaint or documents referenced therein. Liberally interpreted, plaintiff's Complaint describes a tortured landlord-tenant dispute, which has

resulted in multiple prior litigations. The property at issue is located at 155 Avenue B in Manhattan. Complaint ("Compl.") P27. Dibbs is the rent stabilized tenant of "an unlegalized residential apartment" on the ground floor of the building ("the apartment"). Compl. P1, 26-27. He first rented the apartment in 1978. Id. PP26. Defendants Ten Be or Not Ten Be, Inc. and Tim Greenfield-Sanders, president of Ten Be or Not Ten Be, Inc., (collectively "the landlord" [*344] or "landlord defendants") became the landlord of the building in 1984. See id. PP2, 29. Plaintiff alleges that, shortly thereafter, the landlord "engaged [in] a protracted course of harassment against me by withholding the legally required heat, water, ventilation, etc, and producing dangerous and illegal conditions that evicted me from portions of the apartment." Id. P2; see id. PP29-41.

In response, plaintiff began withholding his rent. Id. P38. Then, in March 1993, the New York City Department [**4] of Housing Preservation and Development ("HPD") issued a Notice of Violation ("notice") alerting the landlord that a security gate outside plaintiff's apartment violated governing building codes and had to be removed. See id. PP3, 50, 58, 75, 153; Dibbs v. Tornicasa, 1999 U.S. Dist. LEXIS 3284, No. 98 Civ. 2102, 1999 WL 156359, at *1 (S.D.N.Y. Mar. 23, 1999). This security gate completed the enclosure of an area measuring approximately sixty square feet in size, bordered on either side by the neighboring buildings, at the back by the front wall of Dibbs ' apartment, and toward the sidewalk by a section of iron fence and by the gate. See Compl. P46. While plaintiff was away in

Florida, the landlord removed the security gate without plaintiff's permission, enabling free access to the enclosure where Dibbs had stored some of his belongings. See id. PP45-50; Dibbs, 1999 U.S. Dist. LEXIS 3284, 1999 WL 156359, at *1.

Upon his return Dibbs discovered what had taken place and filed three complaints with the New York State Division of Housing and Community Renewal ("DHCR"), alleging harassment, reduced services, and lack of heat and hot water. See Compl. PP51-53; Dibbs v. Tornicasa, 1999 U.S. Dist. LEXIS 19195, No. 98 Civ. 2102, 1999 WL 1201709, [**5] at *1 (S.D.N.Y. Dec. 14, 1999). Four months after his complaints were filed an informal conference was held, including defendant Mulholland, DHCR administrator, the landlord and his wife, and a heating mechanic. Compl. PP54, 60. At the conference, which allegedly began before plaintiff arrived, the landlord explained that he removed the gate along with plaintiff's household belongings stored in the area because of the building code violation he had received. Id. PP55, 58. Plaintiff claims that defendant Mulholland refused to allow him to speak, and that the conference was eventually moved into a back room where it continued without plaintiff. Id. PP57, 60.

That same month defendant Mulholland issued an order directing the landlord to submit an architect's report explaining how to rebuild the gate without violating building codes. Dibbs, 1999 U.S. Dist. LEXIS 19195, 1999 WL 1201709, at *2; see Compl. P64. The landlord hired architect defendant Pinner to furnish such a report. Dibbs, 1999 U.S. Dist. LEXIS 3284, 1999 WL 156359, at *2. Pinner,

however, "instead of submitting a report on restoring security iron workÖsent at least two letters to Mulholland, stating that he didn't think that iron work was permissible, and intimidated administrator Mulholland to change his order." Compl. P67. Dibbs was not made aware of these "ex parte" communications at the time. Id. P68. Allegedly in response to Pinner's communications, Mulholland "changed his mind" and, on February 9, 1994, decided that he "was only going to install window bars over the existing windowsÖ." Id. PP73, 86.

Plaintiff next filed a Petition for Administrative Review ("PAR"). This PAR was sent back by the DHCR director because it was "an inappropriate means to object to Mr. Mulholland's determination." Id. P91.

On June 28, 1994, the DHCR dismissed Dibbs ' complaints. See id. P96.

Not to be deterred, on December 20, 1994, Dibbs commenced an Article 78 proceeding seeking a declaration that the DHCR's failure to issue a finding of harassment constituted an abuse of discretion. See id. P100; State Defs.' Notice of Mot., dated Aug. 22, 2003 ("Notice of Motion"), Exhibit ("Ex.") A, Feb. 14, 1995 Decision and Order of Justice Joan B. Lobis, ("Lobis Decision") at 1. The Court dismissed Dibbs ' petition because, in the absence of a final order from the DHCR, there was no basis for it. See Lobis Decision at 2; Compl. P103. The Appellate Division affirmed, and the Court of Appeals denied Dibbs ' further appeal. Compl. PP106, 107. 2

FOOTNOTES

2 On April 1, 1996 Dibbs commenced a state court action, index number 105918/96, against the landlord and architect Pinner. See Dibbs, 1999 U.S. Dist. LEXIS 3284, 1999 WL 156359, at *2. That action was dismissed without prejudice on the grounds that Dibbs failed to oppose defendants' motions to dismiss. See Notice of Motion, Ex. F, Nov. 19, 2002 Decision by Justice Eileen Bransten ("Nov. 2002 Bransten Decision"), at 5.

---------- end of footnote ----------

On March 23, 1998, Dibbs filed suit in this Court against defendants Ernest Tornicasa and R. Berry of the HPD, John Mulholland of the DHCR, landlord Tim Greenfield-Sanders, and architect Pinner. Dibbs, 1999 U.S. Dist. LEXIS 3284, 1999 WL 156359, at *1-2. Dibbs ' complaint contained three types of allegations: "Category 1: Defendant Sanders entered Plaintiff's residence without permission, caused damage, and refused to repair that damage; Category 2: Defendants Sanders, Pinner, [**8] Mulholland, Tornicasa, and Berry prevented the fair processing of Plaintiff's harassment complaint; Category 3: Defendant Mulholland and the DHCR have failed to take any final action on Plaintiff's harassment complaint." 1999 U.S. Dist. LEXIS 3284, [WL] at *3. In its March 23, 1999 decision this Court dismissed plaintiff's category two claims against all defendants, with the exception of defendant Sanders who at that time had failed to file a motion to dismiss, declaring them time-barred. 1999 U.S. Dist. LEXIS 3284, [WL] at *5.

Subsequently, in its December 14, 1999 decision, this Court dismissed the remainder of plaintiff's complaint. The Court found that Dibbs ' claims that landlord Sanders prevented the fair processing of his harassment complaint, broke into his apartment, took his personal belongings, demolished the security gate and boarded over the windows and inner door, were all time-barred. See Dibbs, 1999 U.S. Dist. LEXIS 19195, 1999 WL 1201709, at *4. The Court additionally determined that Dibbs ' claim that the landlord tried to evict him by interfering with all of his essential services including heat, water and electricity failed "for want of a sufficient allegation that Defendant Sanders' conduct constituted state action" as required [**9] by ß 1983. 3 See 1999 U.S. Dist. LEXIS 19195, [WL] at *5.

FOOTNOTES

3 The Court alternatively found that, to the extent that Dibbs ' third claim directed at the landlord was a state claim, it would decline to exercise supplemental jurisdiction over it given its dismissal of plaintiff's ß 1983 claims. See Dibbs, 1999 U.S. Dist. LEXIS 19195, 1999 WL 1201709, at *5.

---------- end of footnote ----------

As for defendant Mulholland, Dibbs had alleged "that his due process rights were violated by the DHCR's decision not to commence a formal hearing on his harassment complaint that would have resulted in a final order subject to judicial review." See 1999 U.S. Dist. LEXIS 19195, [WL] at *6. The Court granted defendant's motion for summary judgment on this claim finding that the relevant

New York law provisions did not confer on harassment complainants the right to a formal hearing on their complaints resulting in a final order subject to judicial review, and therefore "Defendant Mulholland's decision to close the inquiry into Plaintiff's harassment complaint without ordering a formal hearing thereon did not violate Plaintiff's [**10] due process rights." 1999 U.S. Dist. LEXIS 19195, [WL] at *7.

Just prior to this final dismissal, in an order dated June 2, 1999, the DHCR Rent Administrator granted the landlord permission to remove the gate, and ordered a [*346] compensatory rent reduction for Dibbs in the amount of $ 27 per month. See Compl., Ex. 1, Order of DHCR, dated Feb. 8, 2000, at 1. Both Dibbs and the landlord filed PARs of this decision. See id. On February 8, 2000, the DHCR ruled on the PARs writing that "the evidence in the record below including the letters from the harassment proceeding, does not support the contention that the installation of a new type of gate with a door would result in a HPD approval" and that the decision granting permission to remove the gate therefore was not in error. See id. at 3. The DHCR additionally ruled that the grant of a decrease in rent commensurate with the decrease in services was appropriate, but that the decrease granted was too large, and should only have been $ 12 per month. See id. at 4. In a subsequent order dated September 14, 2000, the DHCR affirmed a Rent Administrator's determination that an unrelated rent reduction could be discontinued because services had been fully restored. See Notice of Motion, Ex. F, Nov. 19, 2002 Decision by Justice Eileen Bransten ("Nov. 2002

Bransten Decision"), at 4; Compl. P114.

Shortly before the DHCR's final order was released, Dibbs filed a second Article 78 proceeding alleging wrongful deprivation of his living space resulting from the removal of the security gate. Compl. P116. The petition was denied as to the landlord defendants because they "are non-governmental parties who are plainly not subject to Article 78 proceedings in this context." Notice of Motion, Ex. C, Apr. 6, 2000 Decision of Justice Carol E. Huff ("Huff Decision"), at 2. The petition was also denied as to Tornicasa and the HPD because claims based upon the same factual background had previously been dismissed as time-barred by this Court. Id. The petition was denied as to Mulholland and the DHCR because, to the extent such claims had not been previously dismissed by this Court, they were the subject of the pending PARs. Id. These PARs were not decided until February 8, 2000, after Dibbs ' petition had been filed. Id. However, Justice Huff determined that, since Dibbs had filed a motion to amend his petition to include review of the February 8, 2000 DHCR [**12] determination within the sixty-day statute of limitations for an Article 78 proceeding, he should be given leave to file a new petition based on that determination. Id.

Dibbs appealed Justice Huff's decisions and, on March 5, 2002, the Appellate Division determined that the DHCR had not abused its discretion in closing Dibbs ' harassment complaint. Dibbs v. Mulholland, 292 A.D.2d 164, 164-65, 738 N.Y.S.2d 203, 203 (1st Dep't 2002). The Appellate Division further stated that the issue of reduction of services and rent was not before it to consider, as Dibbs,

despite having opportunity to do so, had failed to timely commence a proceeding properly challenging that determination. 4 See id. at 165, 738 N.Y.S.2d at 203.

FOOTNOTES

4 Dibbs also apparently filed an action in this Court seeking review of the February 8, 2000 DHCR determination. That complaint was dismissed for lack of subject matter jurisdiction due to the availability of Article 78 review in the New York state courts. See Nov. 2002 Bransten Decision, at 6 n.2.

---------- end of footnote ----------

Dibbs then commenced another Article 78 proceeding seeking damages and an order restoring him to private possession of the enclosure and annulling the determination to award him a rent decrease of $ 12 per month. Notice of Motion, Ex. E, Apr. 16, 2001 Decision of Justice Eileen Bransten ("Apr. 2001 Bransten Decision") at 1-2. Justice Bransten concluded that Dibbs ' claims relating to his harassment complaint had already been adjudicated, and that those relating to the DHCR's February 8, 2000 order authorizing removal of [*347] the gate and granting a rent reduction were incomplete because Dibbs failed to include a copy of the order with his petition. Id. at 5; see Compl. P117. Justice Bransten dismissed the petition without prejudice to renewal, "so long as [Dibbs] confined his claims to those surrounding the DHCR's February 8, 2000 order, and any subsequent DHCR orders which have not been the subject of other suits (such as the DHCR's September 14, 2000 DHCR order)." Apr. 2001 Bransten Decision, at 6. The Appellate Division

affirmed. Compl. P118.

Dibbs next re-filed his Article 78 proceeding, contesting the DHCR's approval of removal of the security gate and the corresponding rent reduction, the New York City Department of Buildings' ("DOB") December 6, 2001 issuance of a work permit to landlord that would allow for "reconfiguration" and "elimination of a portion of [plaintiff's] apartment," and his landlord's conduct. Compl. P127; see id. PP118, 125-27; Nov. 2002 Bransten Decision, at 7. Justice Bransten now dismissed all of Dibbs ' claims. Nov. 2002 Bransten Decision, at 13; see Compl. P119.

Justice Bransten found no indication that Dibbs was entitled to exclusive use of the area between his apartment and where the security gate had stood, or that there was any governmental taking of his property by removal of the illegal gate, and noted that, "to the extent that Dibbs benefitted from the gate, his rent was reduced to compensate him for the loss of its use." Nov. 2002 Bransten Decision, at 10-11. Justice Bransten concluded that "nothing before this Court suggests that DHCR's determination was arbitrary, capricious or irrational." Id. at 11. Justice Bransten further found that Dibbs had failed to establish that the DHCR's unrelated September 14, 2000 order, which eliminated a monthly rent reduction because of restoration of services, was [**15] an arbitrary or capricious decision, and denied Dibbs ' petition in its entirety on the merits against the DHCR defendants involved. Id. Dibbs ' claim based on the DOB's issuance of a work permit was dismissed because Dibbs had failed to first appeal to the Board of

Standards and Appeals ("BSA") and therefore had not exhausted his administrative remedies. Id. at 12. The claim against the landlord defendants was dismissed because, as non-governmental parties, they were not subject to Article 78 proceedings in such a context. Id. at 13.

Dibbs appealed and, in an opinion dated April 13, 2004, the Appellate Division affirmed, holding that Justice Bransten properly denied Dibbs ' petition for injunctive and declaratory relief as against the DHCR because the Appellate Division had already determined that the DHCR's decision to close Dibbs ' harassment complaint was not an abuse of discretion, and because the proceeding challenging the DHCR's determination granting the landlord's application for service and rent reduction was time-barred, and that Justice Bransten properly declined to entertain Dibbs ' claims against the DOB because he had failed to first exhaust his administrative [**16] remedies. See Dibbs v. Mulholland, 6 A.D.3d 232, 774 N.Y.S.2d 327 (1st Dep't 2004); Compl. P120.

Finally, Dibbs filed the current action on February 7, 2003, which includes the defendants involved in his previous suits as well as the aforementioned New York Supreme Court Justices and Kenneth Podziba, Commissioner of the BSA and the BSA itself, and which is based on the same protracted landlord-tenant dispute described herein.

DISCUSSION

In considering a motion to dismiss, a Court must accept as true all factual allegations set forth in the

complaint and draw [*348] all reasonable inferences in favor of the plaintiff. See Swierkiewicz v. Sorema N.A., 534 U.S. 506, 508 n.1, 152 L. Ed. 2d 1, 122 S. Ct. 992 (2002); Blue Tree Hotels Inv. (Canada), Ltd. v. Starwood Hotels & Resorts Worldwide, Inc., 369 F.3d 212, 217 (2d Cir. 2004) (citing Gryl v. Shire Pharms. Group PLC, 298 F.3d 136, 140 (2d Cir. 2002)). HN2At the motion to dismiss stage, the Court's function is "not to weigh the evidence that might be presented at a trial but merely to determine whether the complaint itself is legally sufficient." Goldman v. Belden, 754 F.2d 1059, 1067 (2d Cir. 1985). [**17] HN3A complaint may only be dismissed for failure to state a claim if it "appears beyond doubt that the plaintiff can prove no set of facts which would entitle him or her to relief." Sweet v. Sheahan, 235 F.3d 80, 83 (2d Cir. 2000). HN4In deciding a motion to dismiss the Court may consider documents referenced in the complaint, documents that the plaintiff relied on in bringing suit and that are either in plaintiff's possession or were known to the plaintiff at the time of bringing suit, or matters of which judicial notice may be taken. See Chambers v. Time Warner, Inc., 282 F.3d 147, 153 (2d Cir. 2002).

The Court has the duty to "read the pleadings of a pro se plaintiff liberally and interpret them 'to raise the strongest arguments that they suggest,'" McPherson v. Coombe, 174 F.3d 276, 280 (2d Cir. 1999) (quoting Burgos v. Hopkins, 14 F.3d 787, 790 (2d Cir. 1994)), while holding them "to less stringent standards than formal pleadings drafted by lawyers." Haines v. Kerner, 404 U.S. 519, 520, 30 L. Ed. 2d 652, 92 S. Ct. 594 (1972) (per curiam). While

the Court must construe pro se complaints liberally, particularly where plaintiff files a pro se complaint alleging civil rights violations, see Deravin v. Kerik, 335 F.3d 195, 200 (2d Cir. 2003), a pro se plaintiff is not exempt from complying with the relevant rules of procedural and substantive law. Traguth v. Zuck, 710 F.2d 90, 95 (2d Cir. 1983). "Courts do 'not accept conclusory allegations on the legal effect of the events plaintiff has set out if these allegations do not reasonably follow from his description of what happened.'" First Nationwide Bank v. Gelt Funding Corp., 27 F.3d 763, 772 (2d Cir. 1994) (quoting Kadar Corp. v. Milbury, 549 F.2d 230, 233 (1st Cir. 1977) (quoting Wright & Miller, Federal Practice and Procedure: Civil ß 1357)). Furthermore, the Court may not exempt pro se plaintiffs from the doctrine of res judicata. See, e.g., Cieszkowska v. Gray Line New York, 295 F.3d 204, 205-06 (2d Cir. 2002).

Dibbs ' current complaint asserts causes of action against seven defendants or groups of defendants: (1) Jerilyn Perine, Commissioner of the HPD, Ernest Tornicasa, Deputy Inspector of the HPD, in his official and individual capacity, 5 "Various unspecified [**19] Building Inspectors" of the HPD, and the HPD itself; (2) Lawrence Pinner, the landlord's architect; (3) Kenneth Podziba, Commissioner of the BSA, and the BSA itself; (4) Paul Roldan, John Mulholland, Dennis Ryan, Deputy Commissioner, Administrator, and Commissioner, respectively, of the DHCR, in their official and individual capacities, as well as the DHCR; (5) Patricia Lancaster, Commissioner of the DOB, and the DOB; (6) Justices Joan Lobis, Carol Huff, and Eileen Bransten of the New York Supreme Court, in

their official and individual capacities, and (7) Tim Greenfield-Sanders and Ten Be or Not Ten Be, Inc., the landlord defendants.

FOOTNOTES

5 Deputy Inspector Tornicasa is not listed in the caption of plaintiff's Complaint, but is mentioned as a defendant therein. See Compl. P17.

---------- end of footnote ----------

Plaintiff's ß 1983 claims against the HPD defendants are precluded by the doctrine of res judicata. HN7"Res judicata assures the finality of judgments by precluding a party to a lawsuit from litigating a [*349] claim more than once." El-Bey v. City of New York, 151 F. Supp. 2d 285, 294 (S.D.N.Y. 2001) (quoting Chase Manhattan Bank, N.A. v. Celotex Corp., 56 F.3d 343, 345 (2d Cir. 1995)). The doctrine takes effect when there exists an adjudication on the merits in a prior law suit; the prior lawsuit involved the party to be precluded or a party in privity with that party; and the claims sought to be precluded were raised, or might reasonably have been raised in a prior lawsuit. Id. at 294.

In his current Complaint, plaintiff claims that the HPD "sided with the landlord and refused to respond to my repeated complaints" about the heat and plumbing conditions in his apartment, Compl. PP40-43, evaded his complaints about lack of ventilation and garbage accumulation, id. P84, "issued the building code violation that removal of the gate was predicated on," id. P75, and that the HPD "does not provide a tenant with adequate pre-deprivation procedures." Id. P139. This Court has

already ruled that plaintiff's claims against the HPD, including ß 1983 claims, based on the same factual predicate and similar allegations, were time-barred. See Dibbs, 1999 U.S. Dist. LEXIS 3284, 1999 WL 156359, at *4-5.

Dismissal based on statute of limitations grounds constitutes a dismissal on the merits. See PRC Harris, Inc. v. Boeing Co., 700 F.2d 894, 896 (2d Cir. 1983). In fact, in an Article 78 proceeding in State Supreme Court based on these same facts, Justice Huff dismissed plaintiff's similar claims against the HPD, citing this Court's prior decision as having res judicata effect. See Huff Decision, at 2. Because prior adjudication on the merits has occurred which involved plaintiff and the HPD, and in which the claims now sought to be precluded were raised or, to the extent any were not, should have been raised given that such claims arise from the very same series of transactions that formed the basis of the previous federal decision, see Pike v. Freeman, 266 F.3d 78, 91 (2d Cir. 2001), plaintiff's claims against the HPD defendants must be dismissed. 6

FOOTNOTES

6 Plaintiff's attempt to avoid this time-bar by including the conclusory allegation that the HPD "acted jointly" with the DHCR, Compl. PP17, 147, in effect attempting to tie the HPD to the DHCR activity occurring in 2000 which is described infra, must be rejected as plaintiff sets forth no facts suggesting any such involvement by the HPD and plaintiff's allegations, therefore, "do not reasonably follow from his description of what happened." First Nationwide Bank, 27 F.3d at 772 (quoting Kadar Corp. v. Milbury, 549 F.2d 230, 233 (1st Cir. 1977)

(quoting Wright & Miller, Federal Practice and Procedure: Civil ß 1357)). To the extent plaintiff utilizes this same strategy to revive claims against defendant Pinner, Compl. PP8, 22, it is likewise rejected.

Further, to the extent plaintiff's Complaint asserts a RICO claim against the HPD, DHCR, and the state justices based on "the ex parte meeting of the judges and DHCR and HPD," id. P258, and the alleged back-dating of an order by Justice Huff, id. P234, such claim must be dismissed as plaintiff has utterly failed to allege facts demonstrating HN8the statutory elements of a civil RICO claim, 18 U.S.C. ß 1962; see Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 496, 87 L. Ed. 2d 346, 105 S. Ct. 3275 (1985). At minimum, plaintiff has not alleged the existence of an "enterprise" within the meaning of 18 U.S.C. ß 1961(4), see First Capital Asset Mgmt., Inc. v. Satinwood, Inc., 385 F.3d 159, 173 (2d Cir. 2004), nor does plaintiff set forth two or more predicate acts by the defendants that satisfy the definition of "racketeering activity." 18 U.S.C. ßß 1961(1), (5).

Nor can plaintiff's Complaint be construed to sufficiently allege that defendants violated plaintiff's civil rights by means of a conspiracy HN9under 42 U.S.C. ß 1985, Compl. P8, as "[a] complaint alleging a conspiracy to violate civil rights is held to heightened pleading standards," Julian v. N.Y.C. Transit Auth., 857 F. Supp. 242, 252 (E.D.N.Y. 1994), aff'd, 52 F.3d 312 (2d Cir. 1995), and plaintiff here has completely failed to allege "specific facts suggesting that there was a mutual understanding among the conspirators to take actions

directed toward an unconstitutional end," id. at 252 (quoting Duvall v. Sharp, 905 F.2d 1188, 1189 (8th Cir. 1990) (per curiam)). Such allegation appears to be no more than an attempt to boot strap those defendants against whom the statute of limitations has expired to the more recent activity of the DHCR and DOB defendants. See discussion infra.

The only actions Dibbs ' Complaint mentions involving defendant architect Pinner were taken in 1993 and 1994 and involve the opinions expressed by Pinner in plaintiff's DHCR proceeding. See Compl. PP22, 66-68, 78-80, 85, 195, 204. Such actions were the subject of a previous suit by Dibbs against Pinner in this Court, and were dismissed as barred by the applicable statute of limitations. See Dibbs, 1999 U.S. Dist. LEXIS 3284, 1999 U.S. 156359, at *4-5. Accordingly, Dibbs ' claims against Pinner are also barred by the doctrine of res judicata.

----------end of footnote----------

Plaintiff's Complaint must be dismissed against defendant Kenneth Podziba, Commissioner of the BSA, and the BSA itself because, even liberally interpreted, it fails to allege any possible cause of action against said defendants. The Complaint is completely silent as to any act or omission performed by the BSA regarding plaintiff. See Compl. PP19, 94, 130, 133. The only relevant reference to the BSA, as previously mentioned, relates to the 2001 work permit issued by the DOB to the landlord. See id. PP125-33. Plaintiff had thirty days to appeal the permit to the BSA and failed to do so. Id. PP130, 133. Justice Bransten dismissed plaintiff's claims against the DOB in the case before

her based on plaintiff's failure to so appeal. See Nov. 2002 Bransten Decision, at 12. As the Complaint suggests no involvement by the BSA in the events that form the basis of this lawsuit, it is dismissed as against the BSA defendants.

Plaintiff's ß 1983 claims against the DHCR and defendants Roldan, Mulholland, and Ryan must also be dismissed. First, to the extent plaintiff's claims against the DHCR defendants are based on events occurring prior to February 8, 2000, they are time-barred. HN10New York Civil Practice Law and Rules ("CPLR") section 214 provides that the statute of limitations applicable to ß 1983 actions brought in federal court in New York is three years. CPLR ß 214; Ormiston v. Nelson, 117 F.3d 69, 71 (2d Cir. 1997). Section 1983 claims accrue when the plaintiff knows or should know of the injury that is the basis of the action. Ormiston, 117 F.3d at 71. Plaintiff commenced the current action on February 7, 2003 and, thus, any alleged injury occurring prior to February 8, 2000 is barred by the statute of limitations. Though the vast majority of plaintiff's Complaint concerns acts occurring [**24] in 1993 and 1994, plaintiff himself acknowledges the February 8, 2000 time-bar. See Compl. P260.

To the extent, then, that plaintiff's claims against the DHCR defendants are based on the DHCR's February 8, 2000 and September 14, 2000 orders, the only allegations involving DHCR not time-barred, it must nonetheless be dismissed because plaintiff is essentially asking this Court to collaterally review the judgments of the New York State courts, specifically the most recent decision of Justice Bransten. This Court lacks the subject

matter jurisdiction to do so. 7

FOOTNOTES

7 Plaintiff's ß 1983 claims against the DHCR, as well as against defendants Roldan, Mulholland, and Ryan to the extent they are being sued in their official capacities for retrospective relief, must additionally be dismissed because "neither a State nor its officials acting in their official capacities are 'persons' under ß 1983." Will v. Mich. Dep't of State Police, 491 U.S. 58, 71, 105 L. Ed. 2d 45, 109 S. Ct. 2304 (1989).

---------- end of footnote ----------

It is well established that a federal [**25] district court is one of original, not appellate, jurisdiction and therefore has no subject matter jurisdiction to review state court decisions. See Dist. of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 482, 75 L. Ed. 2d 206, 103 S. Ct. 1303 (1983); Atl. Coast Line R.R. Co. v. Bhd. of Locomotive Eng'rs, 398 U.S. 281, 287, 26 L. Ed. 2d 234, 90 S. Ct. 1739 (1970); Rooker v. Fidelity Trust Co., 263 U.S. 413, 416, 68 L. Ed. 362, 44 S. Ct. 149 (1923); see also Kropelnicki v. Siegel, 290 F.3d 118, 128 (2d Cir. 2002); Moccio v. N.Y.S. Office of Court Admin., 95 F.3d 195, 198-99 (2d Cir. 1996). Additionally, HN13the Rooker-Feldman doctrine bars not only claims which would involve direct review of a state court decision, but also claims which are "inextricably intertwined" with a state court decision or which seek relief that, if granted, would modify a state court decision. See Feldman, 460 U.S. at 482 n.16. The Second Circuit has explained that "'inextricably intertwined' means, at minimum, that

where a federal plaintiff had an opportunity to litigate a claim in a state proceeding, subsequent litigation of the claim will be barred under the Rooker-Feldman doctrine if it would [**26] be barred under the principles of preclusion." Phifer v. City of New York, 289 F.3d 49, 56 (2d Cir. 2002) (quoting Moccio, 95 F.3d at 199-200).

The Rooker-Feldman doctrine "is generally applied coextensively with principles of res judicata and collateral estoppel If a suit or claim would be barred in state court by either, Rooker-Feldman prevents the federal court from asserting subject matter jurisdiction." Vargas v. City of New York, 377 F.3d 200, 205 (2d Cir. 2004).

Where a ß 1983 action is brought by an unsuccessful Article 78 plaintiff, such as Dibbs, only collateral estoppel will trigger the Rooker-Feldman bar; New York's res judicata rule "does not apply because a state court entertaining an Article 78 proceeding does not have the power to award the full measure of relief available in subsequent section 1983 litigation." Id. Under New York law, collateral estoppel occurs if "(1) the issue in question was actually and necessarily decided in a prior proceeding, and (2) the party against whom the doctrine is asserted had a full and fair opportunity to litigate the issue in the first proceeding." Colon v. Coughlin, 58 F.3d 865, 869 (2d Cir. 1995).

Liberally construing plaintiff's Complaint as the Court must, the only possible surviving basis for a ß 1983 claim against the DHCR defendants is whether the DHCR's determinations in the February 8, 2000 and September 14, 2000 orders constitute an unconstitutional taking. 8 See Compl. PP113-15,

240-41. The DHCR's February 8, 2000 order determined that there was no evidence that a new type of gate would have been approved by the HPD, that the Rent Administrator did not err in granting the decrease in service with a corresponding decrease in rent because of the HPD violation determining that the security gate was illegal, and that the Rent Administrator gave too large of a rent reduction. See Compl., Ex. 1, Order of DHCR, dated Feb. 8, 2000. The September 14, 2000 order affirmed a Rent Administrator's determination that an unrelated rent reduction could be discontinued because services had been fully restored. See Nov. 2002 Bransten Decision, at 4; see Compl. P114.

FOOTNOTES

8 Any due process claim Dibbs attempts to make under the Fourteenth Amendment against the DHCR is time-barred as such claim stems from events occurring in the 1993-94 time period, see Compl. PP147, 254 (DHCR unreasonably delayed in issuing a final order), id. PP144, 148 (DHCR failed to provide Dibbs a hearing prior to or after the removal of the security gate), id. PP51-96 (complaining generally about DHCR's handling of plaintiff's harassment complaint), and cannot be resurrected via the issuance of the February 8, 2000 order. In any event, this Court has already determined that DHCR did not violate plaintiff's due process rights based on similar allegations. See Dibbs, 1999 U.S. Dist. LEXIS 19195, 1999 WL 1201709, at *6-7.

Dibbs ' equal protection claim against the DHCR is based on the vague allegations that the "DHCR took away all my rights" after he filed his

harassment complaint in 1993, id. PP201-02, on DHCR Administrator Mulholland's duty to "maintain my premises in full and habitable use", id. P199, and subsequent refusal to do, see id. P252, and the DHCR's "inaction" and failure "to hold hearings", id. P253, all of which originate from the DHCR's handling of Dibbs ' harassment complaint in the 1993-94 time period; thus, such claim is likewise time-barred.

Additionally, plaintiff's claim that the DHCR violated his personal security under the Fourth Amendment is based on its alleged failure to restore his apartment and remedy the dangerous conditions, id. P252, which Dibbs brought to the DHCR's attention in June 1993, id. P51, and on DHCR inspectors' visits, see id. PP195-96, during the handling of the harassment complaint, which took place in 1993-94; this claim is then also time-barred.

----------end of footnote ----------

In his Article 78 proceeding before Justice Bransten, Dibbs had a full and fair opportunity to litigate this takings question, and in fact did so; Dibbs argued that the removal of the security gate caused him to be partially evicted, that the rent reduction was not an adequate remedy for the loss of part of his apartment, and that the rent-reduction order was an unconstitutional regulatory taking of his property. See Nov. 2002 Bransten Decision, at 7-8.

Justice Bransten actually and necessarily decided the question against Dibbs when she concluded that Dibbs had not shown there was any governmental taking of his property, and that, to the

extent Dibbs benefited from the gate, his rent was correspondingly reduced as compensation. See id. at 10, 11. Justice Bransten further wrote that there was no indication that Dibbs was entitled to exclusive use of the area between his apartment and where the security gate had stood, and held that "nothing before this Court suggests that DHCR's determination was arbitrary, capricious or irrational." Id. 9 The Appellate Division affirmed. See Dibbs, 6 A.D.3d at 232, 774 N.Y.S.2d at 327.

FOOTNOTES

9 Justice Bransten also found that the unrelated September 14, 2000 order merely eliminated a monthly rent reduction because of restoration of services, and that Dibbs had not established that that decision was arbitrary or capricious. Nov. 2002 Bransten Decision, at 11.

---------- end of footnote ----------

This Court cannot possibly consider plaintiff's takings claim based on the DHCR's determinations in these orders without reviewing the merits of Justice Bransten's decision because the two are "inextricably intertwined." See Feldman, 460 U.S. at 475. Dibbs ' takings claim can succeed "'only to the extent that the state court wrongly decided the issues before it' and is thus barred by Rooker-Feldman." Vargas, 377 F.3d at 208 (quoting Pennzoil Co. v. Texaco, Inc., 481 U.S. 1, 25, 95 L. Ed. 2d 1, 107 S. Ct. 1519 (1987)). Therefore, any claims against the DHCR defendants that are not time-barred must be dismissed because the Court lacks subject matter jurisdiction to resolve them. 10

FOOTNOTES

10 To the extent plaintiff invokes this Court's mandamus powers, requesting that the Court "order the DHCR to provide for prompt and Constitutionally adequate hearings," Compl. P254, such request is denied as this Court has already determined Dibbs has no right to such a hearing in this context. See Dibbs, 1999 U.S. Dist. LEXIS 19195, 1999 WL 1201709, at *7.

---------- end of footnote ----------

Plaintiff's claims against the DOB defendants must also be dismissed for failure to state a claim. Plaintiff's ß 1983 claim here appears to stem from alleged procedural and substantive due process and equal protection violations based on the procedure the DOB utilized in issuing a building permit in December 2001 allowing plaintiff's apartment to be modified. [*353] See Compl. PP18, 125, 128-29, 131, 134, 136, 211, 212, 217, 219-21, 223, 225-28, 255-56. Causes of action based on due process violations require "the existence of a federally protectable property right and the denial of such a right in the absence of either procedural or substantive due process." Natale v. Town of Ridgefield, 170 F.3d 258, 262 (2d Cir. 1999). "Substantive due process protects against government action that is arbitrary, conscience-shocking, or oppressive in a constitutional sense." Kaluczky v. City of White Plains, 57 F.3d 202, 211 (2d Cir. 1995). To prevail on this claim, plaintiff must demonstrate that the DOB "so grossly abused their authority that they deprived him of a constitutionally protected property interest." Rackley

v. City of New York, 186 F. Supp. 2d 466, 479 (S.D.N.Y. 2002). [**31] Gross abuse occurs "only where the government action challenged is so 'outrageous' and 'arbitrary' that it 'shocks the conscience.'" Id.

As best the Court can discern, plaintiff's substantive due process claim is based on his argument that allowing "major construction" while plaintiff lives in the apartment "subjects the tenant to undue and unnecessary hardship and dangerous conditions." Compl. P219. Assuming plaintiff's property interest was implicated by the DOB's issuance of a permit that allows for the modification of his rented apartment, and assuming further that plaintiff is expected to live in the apartment during the process, such an allegation, while describing an inconvenience, fails to describe any actions on the part of the DOB that "shock the conscience" because of their arbitrariness or outrageousness. See Rackley, 186 F. Supp. 2d at 479.

Procedural due process "require[s] notice and an opportunity to be heard prior to the deprivation of a property interestÖ." United States v. Premises & Real Prop. at 4492 S. Livonia Rd., Livonia, N.Y., 889 F.2d 1258, 1263 (2d Cir. 1989). Plaintiff's procedural due process claim appears to [**32] be based on the allegation that that he did not receive notice that a permit was being approved or an opportunity to object to it prior to its issuance by the DOB, and that the DOB did not directly send plaintiff a copy of the permit or notice on how to appeal it. See Compl. PP131, 211, 227.

Plaintiff, however, admits in his Complaint that he received a copy of the permit and the plans in

mid-December 2001 from his landlord. See id. P126. In her November 19, 2002 decision, Justice Bransten confirms such receipt, writing that "within a day after issuance of the work permit, Dibbs was sent a copy of the plans, which he later received." Nov. 2002 Bransten Decision, at 12. Plaintiff also recognizes that he had the opportunity to appeal such permit to the BSA within thirty days of its issuance and admits he failed to do so. See Compl. PP130, 133. Had he so appealed, plaintiff would have been entitled to an Article 78 proceeding in an appropriate New York state court. Id. PP130, 133. Instead, plaintiff chose to bring an Article 78 proceeding without first appealing, and the New York court subsequently refused judicial review. See Compl. P133.

"In considering whether [**33] defendants have failed to afford plaintiffs due process ... the Court evaluates the entire procedure, including the adequacy and availability of remedies under state law." Liotta v. Rent Guidelines Bd. for the City of New York, 547 F. Supp. 800, 802 (S.D.N.Y. 1982). Having so reviewed, the Court finds that, in light of the pre- and post-deprivation remedies available to plaintiff, which he acknowledges in his Complaint, and which allow for a quick appeal and subsequent state court review, plaintiff has failed to state a procedural [*354] due process claim. See, e.g., Iwachiw v. New York State Dep't of Motor Vehicles, 299 F. Supp. 2d 117, 122-23 (E.D.N.Y. 2004) (finding plaintiff's pre- and post-deprivation remedies, which included ability to appeal an administrative determination to the appeals board and then prosecuting an Article 78 proceeding, were sufficient

to defeat procedural due process claim).

The Equal Protection Clause "bars the government from selective adverse treatment of individuals compared with other similarly situated individuals if "such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person.'" Bizzarro v. Miranda, 394 F.3d 82, 86 (2d Cir. 2005) (alteration in original) (quoting LeClair v. Saunders, 627 F.2d 606, 609-10 (2d Cir. 1980)). Additionally, equal protection claims can succeed "where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." Vill. of Willowbrook v. Olech, 528 U.S. 562, 564, 145 L. Ed. 2d 1060, 120 S. Ct. 1073 (2000).

Plaintiff's equal protection claim liberally construed appears to be that he stands in a similar position to that of the landlord and therefore should have been included in the permit approval process from the application point forward, instead of merely having the ability to appeal an issued permit after the fact. See Compl. PP223-25. However, plaintiff fails to allege that there is no rational basis for differentiating between him, as a tenant, and the landlord in the permit approval process or that any such differentiating was intentional, see Vill. of Willowbrook, 528 U.S. at 565; [**35] State Police for Automatic Ret. Ass'n v. Difava, 317 F.3d 6, 15 (1st Cir. 2003), let alone that he was subject to different treatment based on any of the aforelisted impermissible

considerations. See Bizzarro, 394 F.3d at 86.

In sum, plaintiff's Complaint fails to state a ß 1983 claim against the DOB defendants and therefore the DOB defendants' motion to dismiss is granted.

Finally, plaintiff's claims against Justices Lobis, Huff, and Bransten of the Supreme Court of the State of New York, New York County, must be dismissed under the doctrine of absolute judicial immunity. HN18"Judicial immunity is an immunity from suit, not just from ultimate assessment of damages." Mireles v. Waco, 502 U.S. 9, 11, 116 L. Ed. 2d 9, 112 S. Ct. 286 (1991). The only prerequisites to judicial immunity are that the judge be performing a judicial act or one that is judicial in nature and that the judge not act in the clear absence of all jurisdiction. See id. at 11-12. Here, Justices Lobis, Huff, and Bransten were clearly acting within the scope of the authority granted to them by the New York State Constitution, Article VI when ruling on Dibbs ' previous actions, and additionally [**36] all actions allegedly taken by them, as described in plaintiff's Complaint and supra, were of a judicial nature, meaning such actions are normally performed by a judge, and the parties dealt with the Justices in their judicial capacity. 11 See [*355] Stump v. Sparkman, 435 U.S. 349, 362, 55 L. Ed. 2d 331, 98 S. Ct. 1099 (1978). Accordingly, Justices Lobis, Huff, and Bransten are entitled to absolute immunity, and the claims against them must be dismissed.

FOOTNOTES

11 To the extent Dibbs requests injunctive relief

against the Justices, such claims must also be dismissed because he has failed to allege the violation of a declaratory decree or the unavailability of declaratory relief. See 42 U.S.C. ß 1983 HN19("In any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable."); see also Montero v. Travis, 171 F.3d 757, 761 (2d Cir. 1999) (per curiam).

---------- end of footnote ----------

In closing, due to the apparent frivolousness of the instant action, plaintiff is warned that should he continue to file actions against the aforementioned defendants based on the events set forth herein he may be barred from filing any future actions in this Court without first obtaining leave of the Court, pursuant to its powers under 28 U.S.C. ß 1651(a). See MLE Realty Assocs. v. Handler, 192 F.3d 259, 261 (2d Cir. 1999).

CONCLUSION

For the foregoing reasons, the Court grants defendants' motions to dismiss the Complaint. Plaintiff's cross-motion to stay this federal action pending the outcome of his state appeal is denied as moot given the April 13, 2004 Appellate Division decision affirming Justice Bransten. 12 See Dibbs, 6 A.D.3d at 232, 774 N.Y.S.2d at 327. A Pre-Trial Conference in this action including plaintiff and the remaining landlord defendants who did not participate in the current motion shall occur on

March 22, 2005 at 3:00 p.m. in Courtroom 705, 40 Centre Street.

FOOTNOTES

12 Plaintiff's cross-motion for an order tolling the statute of limitations to allow him to amend his Complaint in response to the Appellate Division decision is also denied as plaintiff has failed to articulate any legal basis for such request and, in any event, this Court lacks subject matter jurisdiction over any challenge to such decision.

---------- end of footnote ----------

It is SO ORDERED.

Dated: New York, New York
February 14, 2005

John E. Sprizzo
United States District Judge

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Thurgood Marshall U.S. Courthouse at Foley Square, 40 Center street, New York, NY 10007 Telephone 212-857-4500

MOTION INFOMATION STATEMENT

Docket Number 05-6870-cv Caption (use short title)

Motion for REARGUMENT ----------

DIBBS

Plaintiff-appellant

vs

ROLDAN

Defendant-appellee

Set Forth below precise, complete statement of relief sought:

COURT ERRED IN THEIR DECISION: SEEK REVERSAL

MOVING PARTY: Stephen Dibbs, plaintiff appellant petitionr

OPPOSING PARTY: NYC CORP CNSL, NYS ATTY GEN

MOVING PARTY: STEPHEN DIBBS, pro se

OPPOSING ATTORNEY: NYC CORP COUNCIL, Donna Morris Esq for NYC Corporation Council, 100 Church St NYC 212 1233; NYS Attorney General, 120 Broadway, NYC, NY, ;Ben Kaplan, 30 Ave. B, NYC, NY 10009; Zetlin & DeChiara, 801 First Ave, NYC. NY

COURT JUDGES: 2D CIR, WINTER CALEBRESI WALKER

Has consent of opposing counsel been sought, Yes, Has been obtained, No.

Has argument date of appeal been set? No.
Signature of Moving Attorney: Stephen Dibbs
12/11/07
Has service been effected: Yes

ORDER

Before: Hon Ralph K. Winter, Hon John M. Walker, Jr, Hon Guido Calabresi, Circuit Judges
IT IS HEREBY ORDERED, that Appellant's motion for Reconsideration is DENIED.

01/17/08
Date
[court stamp]:
UNITED STATES COURT OF APPEALS
FILED
JAN 17 2008
SECOND CIRCUIT
[end of court stamp]

FOR THE COURT
Catherine O'Hagan Wolfe, Clerk
by, Judy Pismanont, Motions Staff Attorney

DEPARTMENT OF HOUSING PRESERVATION
AND DEVELOPMENT OFFICE OF RENT AND
HOUSING MAINTENANCE

MANHATTAN 9th Floor, 39 Broadway, N. Y., N.Y.

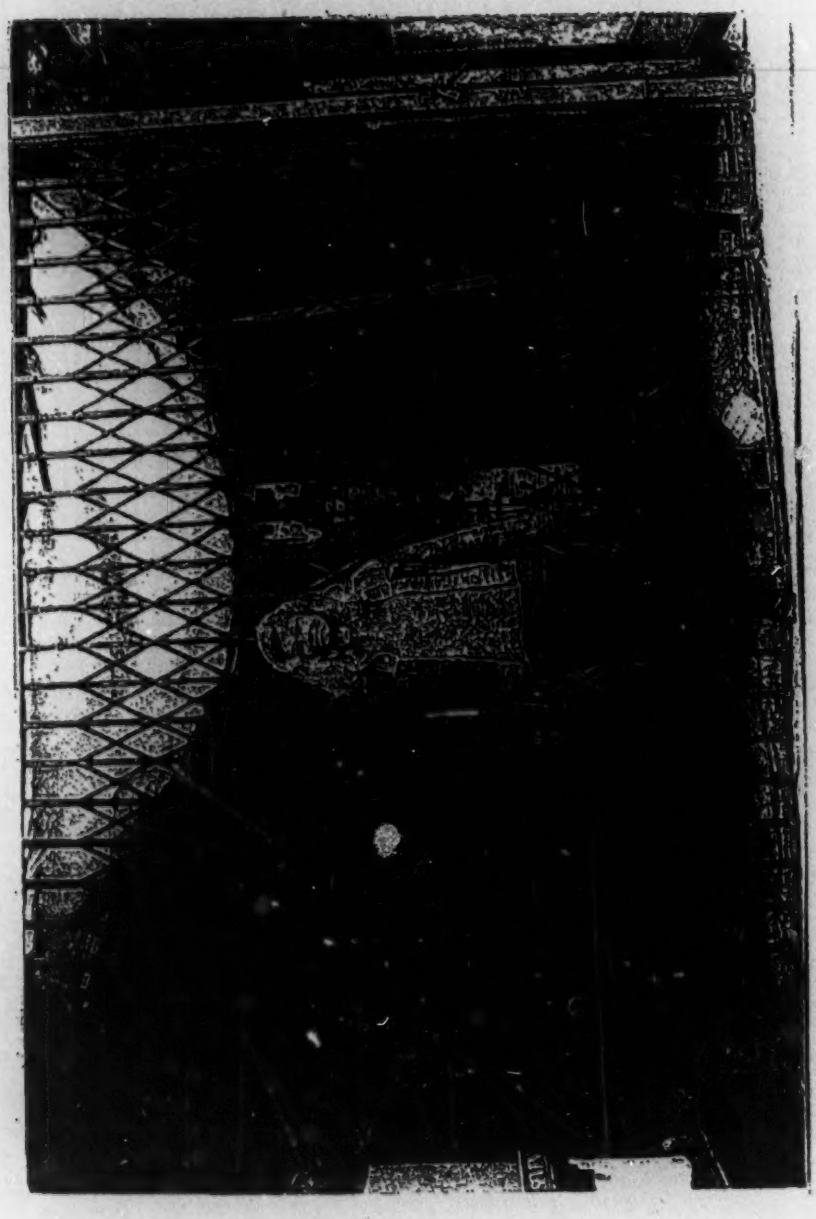
LOCATION	BORO	BLDG	DATE REPORTED
155 AVENUE B	MANH	OL	03-01-93

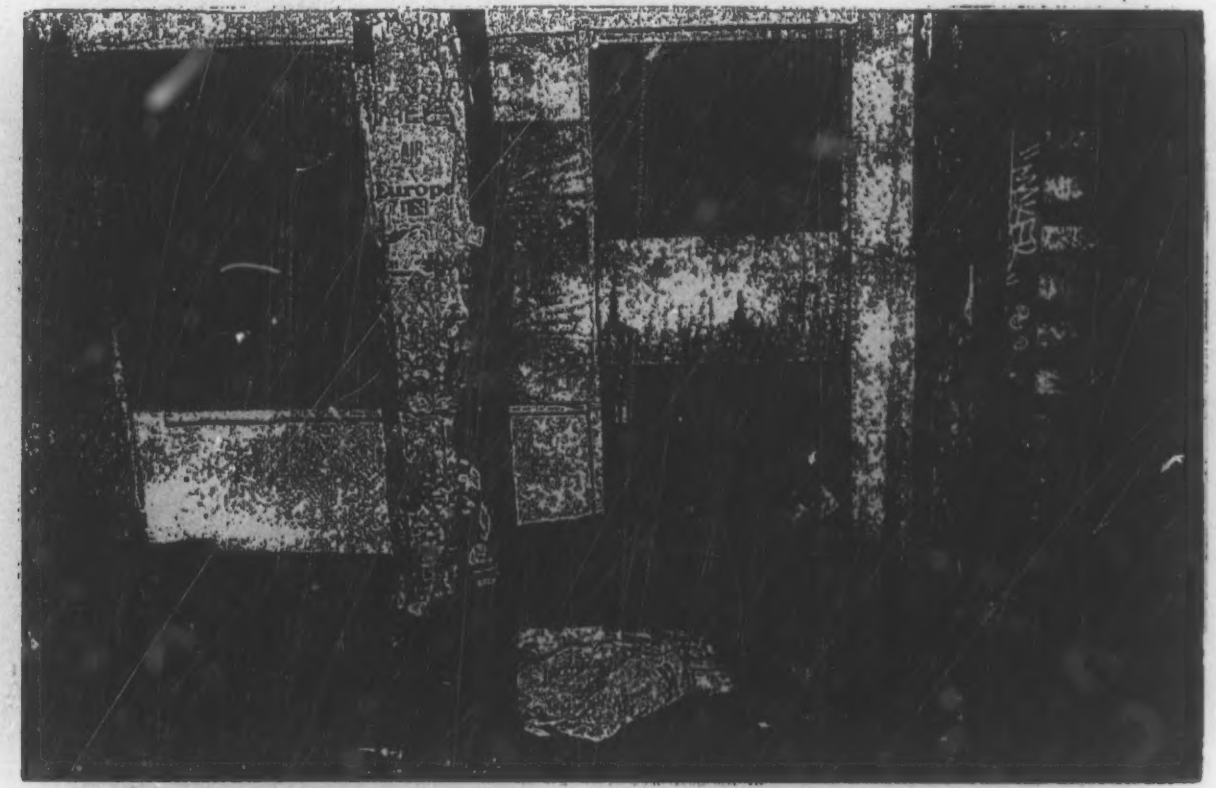
NOTICE OF VIOLATION

SANDERS
Tim
151 First Avenue
New York, N.Y. 10003

All violations listed below are class B
All violation must be corrected by 4/22/93
and certified by 5/6/93

Item	Order	Corrected	VIOLATION DESCRIPTION
125	510	4/2/93	27-2005 AD CODE & M/D LAW ABATE THE NUISANCE CONSISTING OF SECURITY GATE OBSTRUCTING FIRE EGRESS ENTRANCE TO 1 STY GROUND APT.




AIR
Europe

NEW YORK STATE DIVISION OF HOUSING AND
COMMUNITY RENEWAL
OFFICE OF RENT ADMINISTRATION
ENFORCEMENT BUREAU

INSPECTION REPORT

To John Mulholland
enforcement case no. HG 410085-hl
From William Levy
premises: 155 Ave. B N.Y.C. Center storefront Apt. & related public area
Date and Time of Inspection October 27, 1993

Haz grad	Deficiency description	remedy	Other or Further Information
3	Security Gate removed from apt's storefront porch area, security Hazard	L	
4	Water Stained, unpainted, broken areas of walls & ceiling in strorefront porch	O	Check for leak from above, Plaster & Paint
3	Plywood covering apt.	O	After restoring entry door lock & security gate to provide security remove plywood

4	Broken uneven store-	O	make level front porch concrete floor
4	Loose insulation on steam riser in store-front porch	O	secure steam riser or box in riser
-	Slight oder of onions and/or garlic noted in apt.	-	source of odor could not be determined
4	Broken open, cracked and blistered walls & ceiling, apt wide		PP
4	Open, uninsulated ceiling soffit above storefront	O	reinsulate
-	Various beams suspended below ceiling from possible removed hung ceiling		
4	Missing glass pane in front (living room) which is now boarded up	O	replace missing glazing & secure front area

4	Stall Shower unsecured atop cement block platform in rear room	O	secure cement blocks to floor and stall shower to wall & cement blocks
-	No load mechanical or other noise was evident from basement or adjacent storefront or apts.		
-	Lock on 346 E. 10th st tenants primary building entry was in proper order		

Inspector, William Levy
10/28/93

NEW YORK STATE SUPREME COURT
COUNTY OF NEW YORK
PRESENT: HON. LOBIS, Justice

----------x

Stephen Dibbs (Rent Stabilized Tenant)
Petitioner,

ORDER TO
SHOW CAUSE
Index No.
134617/94

V

John Mulholland, Div. Of Housing &
Community Renewal,
Ernest Tornincasa, N.Y.C. Dept of HPD
Tim Sanders, Landlord,
Lawrence Pinner, architect

Respondents.

----------x

Upon reading and filing the application of Stephen Dibbs sworn to on the 16 day of December, 1994; and upon the exhibits annexed hereto

Let the Respondents attorney show cause at IAS Part 20, Room 345 of this Court, to be held at the Courthouse, 60 Center Street, New York, New York, on the 6th Day of Jan, 1995 at 9:30 o'clock in the noon or soon as counsel may be heard why a order should not be made For judicial Review Landlord and his architect and judicial review of the determination of the N.Y. State department of Housing and Community Renewal, and actions and determinations of the N.Y. City Department of Housing Preservation And Development in regard to

complaint filed by tenant with DHCR asserting landlord Harassment.

Sufficient cause appearing therefor, let personal service of a copy of this order, the..and the papers upon which this order is granted upon the respondents on or before the 27 day of Dec, 1994 be deemed good and sufficient.

ENTER
JBL
J.S.C.

[*attached petition of Stephen Dibbs:*]

1) Upon acquisition of the building I live in, during 1984, my landlord singled me out from all the other tenants to pursue a willful and malicious course of actions intended to force me to vacate my apartment. These include:

a) exclusion from building wide capital improvements

b) water turned off for almost two years

c) interruption of electricity and landlord's efforts to block reconnection

d) illegally reduced the size of my apartment on two occasions.

e) Repeatedly make fraudulent and misleading statements and letters to government authorities, concerning my tenancy.

f) Withheld general services and services of building superintendent, and reduce heat.

g) Consistently gave me deceptive, unreasonable and improper notice whenever repairs were to be made.

h) Stole personal and business property from my

apartment.

i) Boarded over windows and door to my apartment, blocking light, ventilation and locking me out.

j) Allows neighboring tenants to create annoying and dangerous conditions.

k) Caused noise and vibration from mechanical devices in basement

l) When court or municipality ordered repairs, landlord accomplished them in a unacceptable unworkmanship manner, or they were incomplete, or he went beyond what was expected to cause damage.

2) I filed a harassment complaint with the N.Y. State Division of Housing and Community Renewal (DHCR).

3) Contrary to what the DHCR has said, they did not investigate my case thoroughly.

4) At the DHCR conference, I was not provided a full and fair opportunity to present my case, but I was directed not to speak so the conference was conducted solely between the DHCR counsel, Mr. John Mulholland and my landlord.

5) The DHCR did not send me a copy or inform me of my landlord's Answer to my complaint. The landlord's answer contained fraudulent statements which I should have been made aware of. I contend that these fraudulent statements biased the proceedings against me.

6) I was not made aware of my landlord's answer to my complaint until I made a Freedom Of Information Law review of the DHCR file almost a year later.

7) I am currently living under severely unhealthy and dangerous conditions, caused by the

removal of a security gate that protected and defined the premises.

a) Homeless people, vagrants and drug users constantly seek refuge in the area which was once protected by the gate, and is supposed to be my apartment.

b) People use this area to urinate and defecate.

c) People attempt to break into my apartment.

8) My landlord justifies removing the previous gate because he was responding to a N.Y. City Department of Housing Preservation And Development (HPD) order to "abate the nuisance of security gate obstructing fire egress."

9) Let me point out to the court and all parties involved, that the HPD violation said "abate the nuisance", and not remove the gate. Thus removal of the entire gate was not required, and if the landlord was more prudent in his duties, a passageway of only 36 inches wide would be enough to fulfill the requirements, and lead to the serious degradation of the habitability of the premises.

10) The premises were disseized without due process of law, in violation of my 5 and 14 amendment rights of the United States Constitution.

11) Furthermore, the landlord went ahead and boarded over the windows and door, locking me out, which is in clear violation of law.

12) My landlord stole my personal and business property which was in the area behind the gate.

a) the theft of my business property has affected my ability to make a living.

13) The New York State Dept. Of Housing

And Community Renewal (DHCR) counsel Mr. John Mulholland, and his director, Steven Cohen failed to find any fault in these matters.

14) Beside withholding my landlord's Answer from me, the DHCR proceedings were unfair because:

a) They denied me information regarding their procedures

b) They gave me wrong information regarding procedures

c) DHCR counsel acted improperly

d) DHCR closed my case without negotiation

15) The DHCR ordered the landlord to reinstall a security gate, but my landlord in his continued efforts to harass me, wrongfully convinced the DHCR that it was not possible.

16) My landlord used his architect to give misleading and intimidating information to the DHCR.

17) My landlord, withheld important information needed to approve a gate or security system.

18) Landlord should be held in contempt.

19) DHCR relied on the opinion of N,.Y. City Department of Housing Preservation And Development inspector, Mr. Ernest TORINICASA, as to whether or not a gate could be installed:

a) he is not an architect

b) plans must be approved by the N.Y.C. Dept of Buildings, and not HPD

c) his opinion was wrong

20) HPD inspector Ernest Tornincasa was biased against me in this proceeding.

21) HPD inappropriately processed my

building complaints.

22) The DHCR proceedings denied a review by the N.Y. City Board of Standard's and Appeals.

23) I was denied a variance.

24) My landlord's notice to me that the original gate was going to be removed was defective, thus depriving me of recourse to the courts and various building departments to block his action.

25) DHCR investigation of my case was incomplete.

26) The actions and intent of my landlord were malicious.

27) The handling of my case by DHCR counsel Mulholland and HPD inspector Tornincasa was irresponsible.

Signed,
Stephen Dibbs
Rent Stabilized Tenant

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 20

----------x

STEPHEN DIBBS,

Petitioner, Index no. 134617/94
Decision and Order

-against-

JOHN MULHOLLAND, et al.,

Respondents.

----------x

JOAN B. LOBIS, J.S.C.

Petitioner seeks an order of this court declaring that the failure of the New York State Department of Housing And Community renewal ("DHCR") to issue a finding of harassment was an abuse of discretion. The respondents cross-move to dismiss this Article 78 proceeding claiming no cause of action has been stated. For the reasons stated below, the cross-motions are granted.

The petitioner has named not only the DHCR but he sued the counsel to the DHCR who investigated petitioner's complaint, and investigator of the New York City Department of Housing Preservation and Development ("HPD") who apparently issued a violation involving the subject premises at one time, the owner of the premises where petitioner resides and whom petitioner has accused of harassing him and and architect involved

in the building in some fashion. Petitioner claimed, inter alia, that respondents have engaged in a course of conduct to force him to vacate his apartment. The DHCR investigated petitioner's complaint. It did not issue a finding. It did however attempt to implement a plan to address some of petitioner's complaints.

The Rent Stabilization Code is quite clear that an aggravated party may file a petition for administrative review ("PAR") against an order issued by the district rent administrator. After the agency's determination of the PAR, the aggravated party has recourse to this court by way of an Article 78 petition to review the agency's actions. But without a final order from the DHCR, there is no basis for this petition. Unlike other proceedings before the DHCR that result in orders, the determination of whether to issue a finding of harassment is left to the discretion of the agency and not subject of court review. Because the DHCR is doing a discretionary act and not a mandatory one, the alternative of mandamus is not available to compel a finding of harassment.

The Petitioner's complaint was dismissed by the agency without any limitation upon the petitioner from filing another complaint in the event circumstances at the building change. The petition is dismissed and the clerk shall enter judgment accordingly.

This constitutes the decision and order of the court.

Dated: Feb. 14, 1995

JBL
J.S.C.

Officially Reported as: 232 A.D.2d 346; 648 N.Y.S.2d 921, 1996 N.Y. App. Div. LEXIS 11205:

SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

In the Matter of Stephen Dibbs,
Appellant,

v.

John Mulholland et al.,
Respondents.

58959

October 31, 1996, Decided
October 31, 1996, ENTERED

JUDGES: Concur--Rosenberger, J. P., Ellerin, Rubin, Kupferman and Nardelli, JJ.

OPINION

Order, Supreme Court, New York County (Joan Lobis, J.), entered February 17, 1995, which granted respondent's cross motions to dismiss this proceeding brought pursuant to CPLR article 78 to annul the Division of Housing and Community Renewal's determination dated June 28, 1994, closing petitioner's harassment complaint, unanimously affirmed, without costs.

The motion court properly found the challenged administrative determination to be nonreviewable at this time since the agency has not yet determined petitioner's pending petition for administrative

review. In these circumstances, neither review nor relief pursuant to CPLR article 78 is available (Matter of Wyndham Realty Co. v New York State Div. of Hous. & Community Renewal, 139 Misc 2d 418, 419-420).

Concur--Rosenberger, J. P., Ellerin, Rubin, Kupferman and Nardelli, JJ.

STATE OF NEW YORK COURT OF APPEALS

At a session of the Court, held at court of Appeals Hall in the city of Albany on the twenty-first day of October 1997

PRESENT, HON. JUDITH S. KAYE, Chief Judge, presiding,

Mo. No. 1233 SSD 78
In the Matter of Stephen Dibbs,
Appellant,

v.

John Mulholland, et al.,
Respondents.

The Appellant having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal be and the same hereby is dismissed without costs, by the court sua sponte, upon the ground that no substantial constitutional question is directly involved.

Stuart M. Cohen
Clerk of the Court

UNITED STATE DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

STEPHEN DIBBS,

Plaintiff,

MEMORANDUM AND ORDER

-against-

98 Civ. 2102

ERNEST TORNICASA, Inspector for New York City Department of Housing Preservation and Development (HPD).
R. BERRY, Inspector for HPD,
JOHN MULHOLLAND, Administrator for New York State Division of Housing and Community Renewal,
Tim Sanders, President of Ten Be or Not Ten Be, Inc., Landlord,
LAWRENCE PINNER, ARCHITECT,

Defendants.

----------x

SAND, District Judge,

Plaintiff Stephen Dibbs brings this pro se action against Defendants Ernest Tornincasa and R. Berry on the New York City Department ot Housing Preservation and Development (the "HPD") (together, the City Defendants"), John Mulholland of the New York State Division of Housing and Community Renewal (the "DHCR"), architect Lawrence Pinner, and Plaintiff's landlord, Tim Sanders. Plaintiff asserts numerous causes of action

based on federal constitutional law and New York State common law arising from modifications Sanders made to Plaintiff's apartment, and Plaintiff's subsequent attempts to obtain legal redress for injuries resulting from those modifications. Presently before the court are (1) Defendant Sanders motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6); Defendant Mulholland's Motion for Summary Judgment pursuant to Federal rule of Civil Procedure 56(b); and (3) Plaintiff's Motion for Summary Judgment; and (4) Plaintiff's Motion for Reconsideration of our March 23, 1999 Memorandum and Order. For the reasons set forth below, the Motions of Defendants Sanders and Mulholland are granted, and Plaintiff's Motions are denied.

Background

Except where otherwise noted, the following facts are taken from Plaintiff's complaint and are assumed to be true for purposes of this Memorandum and Order.

Stephen Dibbs is a New York City resident who lives in a rent stabilized apartment. (see comp P1) Defendant Sanders purchased the building in which Plaintiff now resides in 1984. From that time, Defendant Sanders attempted to evict Plaintiff illegally, including by interrupting and interfering with Plaintiff's heat, water, and electricity.

On or about March 31, 1993, while Plaintiff was in Florida visiting his father, Defendant Sanders broke into Plaintiff's apartment and demolished security bars that were the first door to the premises, as well as a boundary wall. Defendant Sanders also

absconded with Plaintiff's personal belongings, which to date have not been returned. (see comp PP 10-12) Defendant Sanders then placed plywood over the windows and an inner door to Plaintiff's apartment such that Plaintiff could not enter without great difficulty.

Upon returning from Florida and discovering the damage, Plaintiff field a harassment complaint and an application for rent reduction with the DHCR. Approximately three months later, Defendant Mulholland, a DHCR administrator, conducted a conference. Defendant Mulholland began the conference before Plaintiff arrived and directed Plaintiff not to speak and not to respond to adverse witnesses. (see comp P 15.) Defendant SAnders explained that he removed the security bars outside Plaintiff's apartment because the HPD had informed his that the bars violation governing building codes and issued Defendant Sanders a citation. Near the conclusion of the conference, Defendant Mulholland invited all individuals present, other that Plaintiff , into a back room where they had a private conference.

FOOTNOTES

2 Plaintiff concedes that his "complaints were technically deficient" but does not offer further elaboration. (Comp. P 14.)

On October 13, 1993, the DHCR issued an order directing Defendant Sanders to submit an architect's report detailing plans to rebuild the demolished portions of Plaintiff's premises and to undertake necessary repairs based on those
plans. Defendant Sanders hired Defendant Pinner to furnish an architect's report, and Defendant Pinner

concluded that the bars previously in place could not be legally maintained under the New York building codes because the bars hindered egress in the event of a fire. (See Comp. P 19; Winikow Aff. June 9, 1998, Ex's. D & E.) Defendant Pinner informed DHCR of his conclusions in ex parte communications and, in response to Plaintiff's inquiries, Defendant Pinner proved to be rude, evasive, and threatening. (See Comp. P 19.) During this time, the City Defendants -- Defendant Tornicasa in particular -- hid relevant information from Plaintiff and attempted to convince DHCR that it was impossible
to restore Plaintiff's apartment to its original condition.

In light of Defendant Pinner's report, on February 9, 1994, the DHCR reversed its October 13 order and instead directed Defendant Sanders to replace the plywood with safety glass, to use legally acceptable bars to cover the window, and to restore the damaged door to operable condition. (See Comp. P 20; Winikow Aff. June 9, 1998, Ex. F.) Plaintiff filed a petition for administrative review ("PAR") with DHCR, which was rejected [*6] as an inappropriate request in harassment proceedings. (See Comp. PP 23-24.) The DHCR thereafter closed Plaintiff's harassment case, by an order dated June 28, 1994, (see Comp. P 25), but left Plaintiff's request for rent reduction still pending so as to preclude judicial review, (see Comp. P 26).

Plaintiff thereafter filed a second PAR, which to date has remained unanswered. Plaintiff initiated an Article 78 proceeding in the New York State Supreme Court in the nature of mandamus seeking a determination that the DHCR's failure to find

harassment constituted an abuse of discretion. On February 14, 1995, the court rejected the petition in light of the absence of any final order from the DHCR. (See Comp. P 28; Winikow Aff. June 9, 1998, Ex. H.) On October 31, 1996, the Appellate Division, First Department, affirmed this decision finding that "the agency has not yet determined petitioner's pending petition for
administrative review." (Pl's Opp. to Pinner Mot. Ex 3; see also Comp. P 29.) On June 5, 1997, the New York Court of Appeals denied Plaintiff's Motion for leave to appeal. (See Winikow Aff. June 9, 1998, Ex. I.)

On April 1, 1996, during the pendency of [*7] Plaintiff's appeals of the dismissal of his Article 78 action, he filed suit in New York Supreme Court against Defendant Sanders, Defendant Sander's real estate company, and
Defendant Pinner. That action is still pending.

Plaintiff filed suit in this Court on March 23, 1998, seeking a declaratory judgment that the acts of which he has complained are illegal, and for unspecified money damages, equitable relief, and court costs. Plaintiff asserted numerous federal constitutional violations as well as state common law causes of action and premised jurisdiction on 28 U.S.C. ß 1331 and 42 U.S.C. ß 1983. Any jurisdiction the Court may have over Plaintiff's state law claims depends on 28 U.S.C. ß 1367, the statute governing supplemental jurisdiction.

Defendant Pinner moved to dismiss the Complaint on June 12, 1998, Defendant Mulholland on September 17, and the City Defendants on October 26. Plaintiff filed his Motion for

Consolidation on December 8. The Court received the parties' final submissions on January 13, 1999, and at that time considered all Motions to be fully submitted.

LEGAL STANDARD

On a motion to dismiss for failure to state a claim upon which relief may be granted, see Fed. R. Civ. P. 12(b)(6), we must "construe in plaintiff's favor factual allegations in the complaint. . . . Dismissal of the complaint is
proper only where 'it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" Automated Salvage Transp., Inc. v. Wheelabrator Envtl. Sys., Inc., 155 F.3d 59, 67 (2d
Cir. 1998) (quoting Conley v. Gibson, 355 U.S. 41, 45-46, 2 L. Ed. 2d 80, 78 S. Ct. 99 (1957) (footnote omitted)) (citation omitted). Where, as here, Plaintiff proceeds pro se, the Court must liberally construe the Complaint and hold it to less stringent pleading standards. See Boddie v. Schnieder, 105 F.3d 857, 860 (2d Cir. 1997).

DISCUSSION

Plaintiff's Complaint, read broadly, contains three types of allegations: Category 1: Defendant Sanders entered Plaintiff's residence without permission, caused damage, and refused to repair that damage; Category 2: Defendants
Sanders, Pinner, Mulholland, Tornicasa, and Berry prevented the fair processing of Plaintiff's harassment complaint; Category 3: Defendant Mulholland and the DHCR have failed to take any final action on Plaintiff's harassment
complaint.

Because Defendant Sanders has not filed a Motion to Dismiss the Complaint, we do not presently consider the allegations contained in Category 1, or those allegations in Category 2 that apply to him. The remaining Defendants concern themselves entirely with Category 2, and we believe that the Category 2 claims asserted against them must be dismissed. We refuse to dismiss Plaintiff's Category 3 claims against Defendant Mulholland, however, because we believe that Plaintiff's Complaint, read broadly, states a claim on which relief may be granted.

Plaintiff's Category 2 Claims

Each of the Defendants who submitted motion papers moves to dismiss Plaintiff's claims as barred by the applicable statute of limitations.

Congress did not specify a statute of limitations to govern actions filed under 42 U.S.C. ß 1983, and the Court must borrow the relevant limitations and tolling provisions from New York law. See Board of Regents v. Tomanio, 446 U.S. 478, 483, 64 L. Ed. 2d 440, 100 S. Ct. 1790 (1980). Under settled precedent, Plaintiff's ß 1983 claims are governed by the three-year residual statute of limitations that New York applies to unspecified personal injury actions.

See Owens v. Okure, 488 U.S. 235, 249-50, 102 L. Ed. 2d 594, 109 S. Ct. 573 (1989); Ormiston v. Nelson, 117 F.3d 69, 71 (2d Cir. 1997); see also N.Y.C.P.L.R. ß 214 (McKinney Supp. 1999)

Although we look to state law for the guiding limitations provisions, "federal law governs the determination of the accrual date (that is, the date the statute of limitations begins to run) for purposes

of the statute of limitations in a section 1983 action." Ormiston, 117 F.3d at 71. Federal law "'establishes as the time of accrual that point in time when the plaintiff knows or has reason to know of the injury which is the basis of his action.'" Singleton v. City of New York, 632 F.2d 185, 191 (2d Cir. 1980) (quoting Bireline v. Seagondollar, 567 F.2d 260, 263 (4th Cir. 1977)). We must therefore determine when Plaintiff knew or had reason to know that the Defendants were endeavoring to stall his harassment suit and prevent meaningful repair of his residence. We believe that there are two possible accrual dates.

The first date is July 1993. According to Plaintiff's Complaint, at the initial DHCR conference that was held "approximately three months" after Defendant Sanders [*11] damaged Plaintiff's residence on or about March 31, 1993, Defendant Mulholland disallowed Plaintiff from speaking or responding to witnesses, refused to consider all of Plaintiff's evidence, and excluded Plaintiff from the hearing's conclusion, which Defendant Mulholland conducted, with all other parties. behind closed doors.

The second date is June 28, 1994. According to Plaintiff's Complaint, Defendants Pinner, Tornicasa, and Berry held a series of ex parte communications with Defendant Mulholland after the initial conference, in which they attempted to minimize Plaintiff's request for repairs and to bolster Defendant Sander's contention that the bars were legally prohibited. Although Plaintiff was not immediately made aware of these communications,

on February 9, 1994, he was informed that DHCR had reversed its decision to order the repairs Plaintiff had requested. Plaintiff believed that the February 9 decision was unsupported but Defendant Mulholland refused to grant any adjournments or to allow Plaintiff to amend his complaint. In a letter dated June 28, 1994, DHCR informed Plaintiff that after reviewing his complaint, it had concluded that "no further Enforcement action is presently warranted."

The Second Circuit has explained that "the crucial time for accrual purposes is when the plaintiff becomes aware that he is suffering from a wrong for which
damages may be recovered in a civil action." Singleton, 632 F.2d at 192. Even if Plaintiff was initially ignorant of the scope of the potential due process violations that allegedly plagued the DHCR's consideration of his complaint -- a
dubious proposition in light of the circumstances surrounding the July 1993 conference -- Plaintiff received actual notice of the DHCR's adverse determination via the letter of June 28, 1994. As of this date, Plaintiff either knew, or should have known, that potential procedural deficiencies had infected
the DHCR procedure for considering his Complaint.

Even using this accrual date, the later of the two potential ones, Plaintiff's claims are time-barred. Plaintiff filed the Complaint in this action on March 23, 1998, well past the three year deadline that would have lapsed in June 1997. Nor do we see any reason why the statute of limitations should be tolled. See N.Y.C.P.L.R. ß 207 (McKinney Supp.

1999) (defendant's absence from state); id. at ß 208 (defendant's infancy or insanity); id. at ß 209 (war); id. at 210 (death of claimant or person liable). HN4New York law does not allow us to toll where, as may have happened here, a plaintiff delays in bringing a ß 1983 suit due to his belief that an independent state action will provide the desired relief. "If a plaintiff wishes to pursue his claims in succession, rather than concurrently, the legislature has required the plaintiff either to obtain a judicial stay of the time for commencing an action, or to litigate at risk."
Tomanio, 446 U.S. at 486-87 (analyzing New York law). Plaintiff's failure to heed this warning is fatal to his Category 2 claims.

Accordingly, the Category 2 claims asserted against Defendants Pinner, Mulholland, Tornicasa, and Berry must be dismissed as barred by the applicable statute of limitations.

Plaintiff's Category 3 Claims

The New York state courts have stated that the DHCR has yet to enter a final order with respect to Plaintiff's 1993 harassment complaint. (See Winikow Aff. June 9, 1998, Ex's H & I.) Defendant Mulholland correctly argues that it is not within this Court's authority to review or modify these decisions. (See Mulholland's Mem. at 5 (citing Rooker v. Fidelity Trust Co., 263 U.S. 413, 68 L. Ed. 362, 44 S. Ct. 149 (1923), and District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 75 L. Ed. 2d 206, 103 S. Ct. 1303 (1983)); see also 28 U.S.C.A. ß 1738 (West 1999) (full faith and credit); RICHARD

H. FALLON ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1500-04 (4th ed. 1996) (explaining the Rooker/Feldman doctrine)). It is entirely within this Court's province, however, to evaluate whether the DHCR complaint-review procedure comports with federal constitutional requirements. See Feldman, 460 U.S. at 483-84.

In particular, we note that Plaintiff appears bound in a loop whereby the DHCR will not issue a final order and New York's courts express an unwillingness to offer review without one. Putting aside any seeming propriety of mandamus in such a case -- directing the DHCR to issue a final order, regardless of its contents -- our review is not foreclosed by the New York courts' conclusion that, under existing state law, the absence of a final order precludes judicial review. Insofar as Plaintiff's languishing complaint may constitute a denial of federal [*15] due process or equal protection, HN5this Court possesses the authority to evaluate whether DHCR's procedures comply with federal constitutional law. HN6If New York has created a protected liberty or property interest, see Cleveland Board of Educ. v. Loudermill, 470 U.S. 532, 538, 84 L. Ed. 2d 494, 105 S. Ct. 1487 (1985) (stating that property interests are created by state law rather than the federal constitution), such as the right to be free from a landlord's harassment, New York must act within constitutional parameters in providing and protecting this right, cf. Evitts v. Lucey, 469 U.S. 387,
400-01, 83 L. Ed. 2d 821, 105 S. Ct. 830 (1985) ("In short, when a State opts to act in a field where its

action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution -- and, in particular, in accord with the Due Process Clause."); Gittens v. LeFevre, 891 F.2d 38, 40 (2d Cir. 1989) (finding that New York had created a liberty interest with respect to certain prison conditions and therefore finding that the "State

must provide a minimum of due process commensurate with the government function involved and the private interest affected"). [*16] Although we take no position on the merits of this potential federal constitutional claim, the issue not having been briefed by either side and the particular facets of DHCR review not having been presented to the Court, we believe that it would be premature to dismiss pro se Plaintiff's Category 3 claims at this time insofar as they seek declaratory and injunctive relief. 3

FOOTNOTES

3 "HN7It is well settled . . . that while the Eleventh Amendment bars claims for damages" against states and state officials acting in their official capacities, "prospective injunctive relief against a state officer sued in his official capacity is permissible," Graus v. Kaladjian, 2 F. Supp. 2d 540, 542 (S.D.N.Y. 1998) (citing Ex Parte Young, 209 U.S. 123, 52 L. Ed. 714, 28 S. Ct. 441 (1908); Burgio and Campofelice, Inc. v. NYS Dep't of Labor, 107 F.3d 1000, 1006 (2d Cir. 1997)) (footnote omitted), as is an award of money damages in a suit against a state officials acting in his individual

capacity, see Hafer v. Melo, 502 U.S. 21, 27, 116 L. Ed. 2d 301, 112 S. Ct. 358 (1991). We construe Plaintiff's
Category 3 claims for undue delay as being against Defendant Mulholland in his official capacity because the real party in interest is the DHCR, see Kentucky v. Graham, 473 U.S. 159, 165-67, 87 L. Ed. 2d 114, 105 S. Ct. 3099 (1985), which
has delayed in issuing a final order. In essence, it is the DHCR's conduct as a whole, rather than Defendant Mulholland's in particular, that gives rise to Plaintiff's Category 3 cause of action. Accordingly, money damages are not available to Plaintiff for this claim.

[*17] For similar reasons, we do not today resolve the question of the timeliness of Plaintiff's Category 3 claims, which are subject to the same three-year statute of limitations that governed the Category 2 claims. The earliest date from which a cause of action for excessive agency delay could begin to run in this case is February 14, 1995, when the New York Supreme Court issued its opinion denying Plaintiff's request for mandamus due to the absence of a final DHCR order. Assuming that Plaintiff should have been aware, from that date, that the DHCR was engaging in impermissible delay, Plaintiff's present claim is time-barred.

Plaintiff's claim may not have accrued until later, however, especially if one reads the supreme court's decision as denying relief because the action was filed too early. One might reasonably pause after such a declaration to wait for

the desired final order, and reach the conclusion that the delay had risen to the level of a constitutional violation only some time later. It is also possible that Plaintiff's claim did not accrue until the Appellate Division affirmed the lower court's ruling or the Court of Appeals's denial Plaintiff leave to appeal. Under any of [*18] these scenarios, Plaintiff's Category 3 claims would be timely.

In light of the need for further elaboration regarding all facets of the DHCR-review procedure, including information regarding when a complainant should become aware that a final DHCR order is not forthcoming, we deny Defendant Mulholland's Motion to dismiss Plaintiff's Category 3 claims without prejudice to renewal of that Motion at a later date. The information presently before the Court regarding the DHCR procedures is simply too sparse to allow dismissal of the Category 3 claims, on either substantive or statute of limitations grounds. Accordingly, Defendant Mulholland's Motion to dismiss the Category 3 claims is denied insofar as Plaintiff seeks declaratory or injunctive relief.

Plaintiff's New York State Common Law Claims

It follows from the foregoing that some of Plaintiff's state common law claims should be dismissed from this action as well. According to HN8 28 U.S.C. ß 1367(a), in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction [*19] that

they form part of the same case or controversy under Article III of the United States Constitution. Pursuant to HN9ß 1367(c), a district court may decline to exercise supplemental jurisdiction where the state law "claim[s] substantially predominate[] over the claim or claims over which the district court has original jurisdiction, . . .
the district court has dismissed all claims over which it has original jurisdiction, or . . . in exceptional circumstances, there are other compelling reasons for declining jurisdiction." Id. at ß 1367(c)(2)-(4). HN10We must analyze the propriety of asserting supplemental jurisdiction as to each claim independently, rather than for the action in toto. See Manway Constr. Co. v. Housing Auth., 711 F.2d 501, 504 (2d Cir. 1983) ("Where a party asserts what really are two sets of distinct claims, there must be grounds for federal
jurisdiction with respect to each."). 4

FOOTNOTES

4 We do not presently consider the state claims asserted against Defendant Sanders; thus, all Category 1 claims remain in this action as do those Category 2 claims asserted against him. As with all jurisdictional matters, the Court retains the right to revisit this issue sue sponte or upon a properly filed motion. Plaintiff does not appear to articulate any state law cause of action for undue delay under Category 3.

[*20] Because we have dismissed all of Plaintiff's federal claims arising from alleged procedural abnormalities in the DHCR's processing of his harassment complaint (Category 2), we believe it is appropriate to dismiss the related state law

claims flowing from those events as well. Under ß 1367(a), we could retain jurisdiction only if the Category 2 state law claims were so closely related to federal claims as to be part of the same case or controversy. Here, we have dismissed all Category 2 claims over which we have original jurisdiction and the remaining federal causes of action -- Category 1 against Defendant Sanders for destruction of Plaintiff's premises and Category 3 against Defendant
Mulholland for undue delay -- are independent claims arising from wholly separate facts. See Manway, 711 F.2d at 504-05. Therefore, we lack jurisdiction over Plaintiff's Category 2 state common law claims and dismiss them from the
action.

Plaintiff's Motion for Consolidation

Plaintiff's request for consolidation of this suit with his pending state action must be denied. There is simply no authority for removing a properly filed state court action where, as here, the defendants have not requested [*21] removal. See 28 U.S.C.A. ß 1441 (West 1999). The Court is similarly devoid of authority to grant Plaintiff's alternative request, for a stay of the state court proceeding. Federal courts may not enjoin state court proceedings except in narrowly prescribed circumstances, none of which is present here. See id. at ß 2283 ("HN11A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress,
or where necessary in aid of its jurisdiction, or to protect or effectuate its

judgments.").

The result of the interplay of these two rules is eminently logical and comports well with the notions of federalism that undergird the relationship between the
states and the federal government. It would be anomalous to allow an individual to file suit in state court, proceed until he becomes fearful that the result there will be unfavorable, and then allow him either to move that action elsewhere or to stall it indefinitely while another tribunal undertakes the time-consuming task of considering the exact same claims all over again. Plaintiff's request therefore lacks legal authority.

CONCLUSION

For the foregoing [*22] reasons, the Motions of Defendants Pinner, Tornicasa, and Berry are granted in their entirety. Defendant Mulholland's Motion is granted except insofar as the Complaint asserts a claim for undue delay in issuance of a final order by the DHCR and seeks declaratory or injunctive relief. In that respect, Defendant Mulholland's Motion is denied without prejudice to renewal at a later date. Plaintiff's Motion for Consolidation is denied. Plaintiff's claims against Defendant Sanders are not altered by this Memorandum and Order. The parties are directed to confer and submit a proposed scheduling order by june 1, 1999. This proposed order should include a discovery schedule and a date for submission of the pretrial order. The parties should also indicate the earliest date by which they anticipate that the case will be ready for

trial.
The Clerk of the Court is informed that this case remains open.
SO ORDERED.
Dated: New York, NY
March 23, 1999
Leonard B. Sand
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

STEPHEN DIBBS,

Plaintiff,

-against-

MEMORANDUM AND ORDER

ERNEST TORINICASA, Inspector for New York City Department of Housing Preservation and Develment ("HPD"), R. BERRY, Inspector for HPD, JOHN MULHOLLAND, Administrator For New York State Division of Housing And Community Renewal (DHCR), TIM SANDERS, President of TEN BE OR NOT TEN BE, Inc. Landlord, LAWRENCE PINNER, Architect,

98 Civ. 2102

Defendants.

----------x

SAND, District judge,

Plaintiff, Stephen Dibbs brings this pro se action against Defendants Ernest Tornicasa and R. Berry of the New york City Department of Housing Preservation and Development (the "HPD") (together, the "City Defendants"), John Mulholland of the New York State Division Of Housing And Community Renewal (the DHCR), Architect Lawrence Pinner, the Plaintiff's landlord, Tim Sanders. Plaintiff asserts numerous causes of action based on federal constitutional law and New york State common law arising from modification Sanders made to Plaintiff's apartment, and

Plaintiff's subsequent attempts to obtain legal redress for injuries resulting from those modifications. Presently before the Court are (1) Defendant Sanders' Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6); (2) Defendant Mulholland's Motion for Summary Judgment pursuant to Federal Rule of Civil Procedure 56(b); (3) Plaintiff's cross motion for summary judgment; and (4) Plaintiff's Motion for Reconsideration of our March 23, 1999 Memorandum and Order. For the reasons set forth below, he Motions of Defendants Sanders and Mulholland are granted, and plaintiff's Motions are denied.

Background

Stephen Dibbs is a New York City resident who lives in a rent stabilized apartment. (See Comp. Para 1.). Defendant sanders purchased the building in which Plaintiff now resides in 1984. From that time, Defendant Sanders allegedly attempted to evict Plaintiff illegally, including by interrupting and interfering with Plaintiff's heat, water, and electricity. (see comp. ¶. 9)

On or about March 31, 1993, while Plaintiff was in Florida visiting his father, Defendant Sanders entered Plaintiff's apartment without consent and demolished security bars that were the first door to the premises, as well as a boundary wall. Defendant Sanders also allegedly absconded with Plaintiff's personal belongings, which to date have not been returned. defendant Sanders then placed plywood over the windows and the inner door to Plaintiff's apartment such that Plaintiff could not enter without great difficulty. (See, comp. ¶ 10-13.)

On June 22, 1993, Plaintiff simultaneously filed three complaint with the DHCR: (1) a Harassment Complaint, (2) a Reduced Services Complaint, and (3) a Lack of Heat and Hot Water complaint. (See id ¶ 14, Mulholland Aff. ¶22.) In these three complaints, Plaintiff makes many of the same allegations against Defendant Sanders as he makes in the Complaint before this Court.(footnote 1)

----------footnote 1 ----------

Plaintiff concedes that his "complaint were technically deficient" but does not offer further elaboration. (comp. ¶ 14.)

---------- end of footnote ----------

In response to Plaintiff's Harassment Complaint, defendant Mulholland, a DHCR administrator, conducted a conference on October 6, 1993, which was attended by Plaintiff, Defendant Sanders, Sanders' wife, a contractor, and the building superintendent. (See, Comp. ¶ 14; Mulholland Aff. ¶ 28.) Plaintiff alleges that Defendant Mulholland began the conference before Plaintiff arrived and direct Plaintiff not to speak and not to respond to adverse wittiness. Defendant Mulholland denies both of these allegations. (See Mulholland aff. ¶ 29.) Defendant Sanders explained that he removed the security bars outside Plaintiff's apartment because the HPD had informed him that the bars violated governing building codes, and had issued Defendant Sanders a citation. (See Comp.¶ 16; Mulholland aff. ¶ 31.) Near the conclusion of the conference, Defendant Mulholland allegedly invited all individuals present, other than Plaintiff, into a back room where they had a private conference. (See

Comp.¶16.) Defendant Mulholland denies this allegation. (See Mulholland Aff. ¶ 30.

On October 13, 1993, defendant Mulholland issued an order direction Defendant Sanders to submit an architect's report detailing plans to rebuild the demolished portions of Plaintiff's premises and to undertake necessary repairs based on those plans. (See Comp. ¶ 17; Mulholland aff. ¶ 33.) Defendant Sanders hired Defendant Pinner to furnish the architect's report. defendant Pinner concluded that the bars previously in place could not be legally maintained under the New York Building codes because the bars hindered egress in the event of a fire, and he thus submitted a proposal for the alternative type of security gate. (See Comp. ¶ 19; Winikow Aff. June 9, 1998, Ex's. D & E.) During this period, the City defendants - Defendant Tornicasa in particular - allegedly hid relevant information from Plaintiff and attempted to convince the DHCR that it was impossible to restore Plaintiff's apartment to its original condition (See Comp. ¶¶ 19-20.)

On February 9, 1994, Defendant Mulholland directed defendant Sanders to install the replacement security gate proposed by Defendant Pinner and endorsed by Defendant Tornicasa. (See Comp. ¶ 20; Mulholland Aff. ¶ 39.) In a letter dated February 11, 1994, Plaintiff objected to this directive and asked Defendant Mulholland to notify him of his right to appeal it. (See Mulholland Aff. Ex. F2.) On March 4, 1994, Defendant Mulholland advised Plaintiff by letter that there was no formal appeal process for such decisions made pursuant to a harassment complaint. (See Mulholland Aff. ¶ 40.) Shortly thereafter, however, Plaintiff nevertheless

filed a petition for administrative review ("PAR") with the DHCR. (See Comp. ¶ 23.) In a letter dated April 11, 1994, the DHCR's Director of Enforcement advised Plaintiff that Defendant Mulholland's decision was not appealable and, accordingly, returned Plaintiff's Par forms. (See Comp. ¶23; Mulholland Aff. ¶42.)

Thereafter Plaintiff repeatedly rebuffed Defendant Sander's efforts of comply with Defendant Mulholland's February 9, 1994 directive, i.e. he declined to provide Defendant Sanders access to his residence for the purpose of making the directed repairs. (See Mulholland Aff.¶ 43.) After having warned Plaintiff several times that his failure to provide such access would occasion the dismissal of his Harassment Complaint, defendant Mulholland informed Plaintiff by letter, on June 27, 1994, that he was recommending the closing of Plaintiff's harassment case. (See Mulholland aff. ¶ 43 & Ex. H3.) On July 25, 1994, Plaintiff attempted to "appeal" this decision to close his case by filing a second PAR. The DHCR has not responded to this PAR. (See Comp. ¶ 27.)

Plaintiff further alleges that when the DHCR formally closed his harassment case on June 28, 1994, the DHCR left his Rent Reduction Complaint pending so as to preclude judicial review. (See Comp. ¶ 26.) On August 24, 1994, however, the DHCR granted Plaintiff's request for a rent reduction. (See Mulholland Aff. ¶54 & Ex K3.) Plaintiff had the right to seek administrative review of this decision, but declined to do so. (see Mulholland Aff. ¶¶ 55-56 & K3, L3.)

Instead, in December 1994, Plaintiff initiated

an Article 78 proceeding, in New York State Supreme Court, in the nature of mandamus seeking a declaration that the DHCR's failure to issued a finding of harassment constituted an abuse of discretion. (See Comp. ¶28.) On February 14, 1995, the court denied Plaintiff's petition on the ground that "[u]nlike other proceedings before the DHCR that result in orders, the determination of whether to issue a finding of harassment is left to the discretion of the agency and not subject to court review. Because the DHCR is doing a discretionary act and not a mandatory one, the alternative of mandamus is not available to compel a finding of harassment." (See Mulholland Aff. ¶ 52 & Ex. A4; Comp. ¶ 28. Plaintiff appealed this decision to the Appellate Division, and, on October 31, 1996, the Appellate Division, First Department, affirmed. (See Winikow Aff. June 9, 1998, Ex 1.)

On April 1, 1996, during the pendency of Plaintiff's appeal to the Court of Appeals, he filed suit in New York Supreme court against Defendant Sanders, defendant Sander's real estate company, and Defendant Pinner. That Action is apparently still pending.

Plaintiff filed suit in this Court on March 23, 1998, seeking a declaratory judgment that the acts of which he has complained are illegal, and for unspecified money damages, equitable relief, and court costs. Plaintiff asserted numerous federal constitutional violations as well as state common law causes of action and premised jurisdiction o 28 USC § 1331 and 42 USC § 1983, Any jurisdiction the Court may have over Plaintiff's state law claims depends on 28 USC § 1367, the stature governing

supplemental jurisdiction.

Defendant Pinner moved to dismiss the Complaint on June 12, 1998, Defendant Mulholland on September 17, and the City Defendants on October 26. Plaintiff filed a Motion for Consolidation on December 8. In our Memorandum and Order of March 23, 1999, the Court granted the Motions of Defendants Pinner, Tornicasa, and Berry, denied Plaintiff's Motion, and granted in part and denied in Part Defendants Mulholland's Motion.

On May, 21, 1999, defendant Mulholland moved for Summary Judgment on the surviving elements of Plaintiff's Complaint. On June 17, 1999, defendant Sanders moved to dismiss. And on September 1, 1999, Plaintiff filed his Cross-Motion for Summary Judgment and his Motion for Reconsideration of our March 23, 1999 Memorandum and Order.

DISCUSSION

1. Defendant Sanders Motion to Dismiss.

On a motion to dismiss for failure to state a cause of claim upon which relief may be granted, see FRCP 12(b)(6), we must "construe in Plaintiff's favor factual allegation in the complaint... Dismissal of the complaint is proper only where it appears beyond doubt that the plaintiff con prove no set of facts in support of his claim which would entitle him to relief." Automated Salvage Transp. Inc. v Wheelabrator Envtl. Sys. Inc., 155 F.59, 67(2d Cir 1998) (quoting Conley v Gibson, 355 U.S. 41, 45-46(1957)(footnotes omitted)(citation omitted. Where as here, Plaintiff proceeds pro se the Court must liberally construe the Complaint and hold it to a less stringent pleading standards. See Boddie v

Schnieder, 105 F3d 857, 860(2d Cir 1997).

Plaintiff advances three distinct claims against Defendant Sanders. First, he alleges that Defendant Sanders - along with all of the other Defendants- prevented the fair processing of his harassment complaint. (See Comp.¶¶15-20). Second, he alleges that Defendant Sanders, on or about March 31, 1993,(a) illegally broke into his apartment, (b) carried off-and never returned-his personal belongings, (c) demolished security bars and a boundary wall, and (4) boarded over the windows and an inner door of the apartment, effectively locking him out of his apartment. (See id ¶¶10-13.) Third, he alleges that, from 1984 onward, Defendant Sanders "has tried to evict[Plaintiff] by...interrupting and interfering with all of his essential and required services, including heat water, electricity, repairs and improvements...."(Id ¶ 9.)

Defendant Sanders argues that, insofar as any of these claims are intended by Plaintiff to be Section 1983 claims, they should be dismissed because they are barred by the applicable statute of limitations. (See Kaplan Aff at 2.) As noted in our previous Memorandum and Order, Section 1983 claims are governed by the three year residual statute of limitations that New York applies to unspecified personal injury actions. See Owens v Okure, 488 US 235, 249-250(1989); Ormiston v Nelson, 117 F.3d 69, 71(2d cir 1997); see also N.Y. CPLR § 214(McKinney Supp 1999). The accrual date (i.e., the date the statute of limitations begins to run for Section 1983 claims is the "point in time when the plaintiff knows or has reason to know of the injury which is the basis of his action." Singleton v

City of New York, 652 F2 185, 191 (2d Cir 1980). Plaintiff explicitly indicates that his second claim is intended to be a Section 1983 claim when he alleges that "the landlord's illegal self-help entry [was] unconstitutional." (Comp ¶15.) Given the nature of the first claim, we assume that Plaintiff intends it to be a Section 1983 claim as well. As the third claim could be merely a state claim, we will consider it from both perspectives, i.e., first, as a Section 1983 claim, and then as a state claim.

In our previous Memorandum and Order, we concluded that the accrual date of the first claim was June 28, 1994 - the date on which the DHCR informed Plaintiff, by letter, that it had concluded that "no further Enforcement action is presently warranted" as regards Plaintiff's harassment complaint. Given that Plaintiff filed the present Complaint on March 23, 1998, we held this claim - as directed against all of the Defendants except Defendant Sanders - to be time barred. In light of this previous finding, we no hold that this claim - insofar as it is directed at Defendant Sanders - is likewise time-barred.

Turning to Plaintiff's second claim, given that it is based on actions allegedly taken by Defendant Sanders on or about March 31, 1993, it is evident that this claim is also time-barred.

Unlike Plaintiff's first two claims, this third claim appears not to be time-barred. Plaintiff suggests that Defendant Sanders' interference with Plaintiff's essential services was ongoing as of the date the Complaint was filed. Assuming, first, that Plaintiff intends this claim to ba a Section 1983 claim, it would fail for want of a sufficient allegation

that defendant Sanders' conduct constituted state action. (footnote 2)

---------- footnote 2 ----------

In contrast, in the context of his first claim, Plaintiff alleges that Defendant Sanders' "self-help entry" on March 31, 1993 was the result of his responding to a violation issued by defendant [HPD]. (Comp ¶15.) This allegation of government involvement in Defendant Sanders' actions at least has the potential of satisfying the state action requirement. Plaintiff makes no such allegation of state involvement in the context of his third claim.

---------- end of footnote ----------

See, 42 USC § 1983. Assuming on the other hand, that this is intended to be a state law claim, we decline to exercise supplemental jurisdiction over it, as we have already concluded that Plaintiff's Section 1983 claims against Defendant Sanders - i.e., those claims over which we would have original jurisdiction - are time-barred. See 28 USC §1367(c).

In light of the foregoing, we grant Defendant Sanders' Motion to Dismiss.

II. Defendant Mulholland's Motion for Summary Judgment.

The Court may grant summary judgment only when the moving papers and affidavits submitted by the parties how that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P. 56(c); see also Celotex Corp v Catrett, 477 US 317. 322-23 (1986); Brown v City of Oneonta 106 F3d 1125, 1130 (2d Cir 1997). In considering a motion for summary judgment, a court "is not to weigh the

evidence but is instead required to view the evidence in the light most favorable to the party opposing summary judgment, to draw all reasonable inferences in favor of that party, and to eschew credibility assessments." Weyant v Okst, 101 F3d 645, 854(2d Cir 1996). Summary judgment is a drastic procedural weapon because "its prophylactic function, when exercised, cuts off a party's right to present his case to the jury." Garza v Marine Transp. Lines Inc. 861 F2d 23, 26 (2d Cir 1998)(quoting Donnaelly v Guion, 467 F2d 290, 291(2d Cir 1972).

as noted, in our previous Memorandum and Order we granted Defendant Mulholland's Motion to Dismiss in part and denied it in part. We granted it in regard to Plaintiff's claim that Defendant Mulholland - along with other Defendants - prevented the fair processing of Plaintiff's harassment complaint. we denied it in regard to Plaintiffs claim that Defendant Mulholland, action in his official capacity as a DHCR administrator, failed to order a formal hearing on this complaint that would have resulted in a final order subject to judicial review. Defendant Mulholland now seeks summary judgment on this latter claim. More specifically, Defendant Mulholland advanced three arguments in support of this Motion: (1) Plaintiff's claim is barred by the applicable statute of limitations (2) Plaintiff insufficiently alleges a violation of his constitutional rights' and (3) even assuming that plaintiff sufficiently alleges a violation of his constitutional rights, the Court should abstain from considering this claim in conformity with the doctrine of abstention established by the Supreme Court in Burford v Sum

Oil Co, 319 US 315 (1943). We begin with the Statute of Limitations argument.

A. Statute of Limitations

Plaintiff alleges that his constitutional rights were violated by Defendant Mulholland's decision not to recommend a formal hearing n his harassment complaint that would have resulted in a final order subject to judicial review. Defendant Mulholland argues that Plaintiff must have been aware of the injury no later than February 14, 1995: the on which Justice Lobis issued her decision confirming the DHCR's position that Defendant Mulholland's decision not to recommend a formal hearing on Plaintiff's harassment complaint was not an order and thus not subject to appeal. As this event, Defendant Mulholland argues, took place more that three years prior to the date on which Plaintiff filed his complaint, Plaintiff's claim against Defendant Mulholland is time-barred.

We disagree with this reasoning. Upon learning of Justice Lobis' decision, Plaintiff could have reasonable believed that it was incorrect, and that the Appellate Division would correct the error. Hence, given that the Appellate Division did not affirm justice Lobis' determination until October 31, 1996 - i.e., less that three years prior to the March 23, 1998 filing date of Plaintiff's Complaint - we hold that Plaintiff's claim against Defendant Mulholland is not time-barred.

B. Violation of constitutional rights

To state a valid Section 1983 claim, a plaintiff must sufficiently allege a violation of "rights, privileges, or immunities secured by the Constitution and [federal] laws...."42 USC § 1983. Plaintiff

alleges that his due process rights under the Fifth and fourteenth Amendments were violated by the DHCR's decision not to commence a formal hearing on his harassment complaint that would have resulted in a final order subject to judicial review. More specifically, Plaintiff appears to allege that the DHCR's regulation affording tenants the opportunity to lodge harassment complaints against their landlords conferred upon him a property interest in a formal hearing on his harassment complaint that would have resulted in a final order subject to judicial review. (See Comp. ¶ 3; Pl's Cross-Motion ¶5.)

To sufficiently allege this claim, Plaintiff must point to a state statute or custom that creates an entitlement to this alleged property interest. See Board of Regents v Roth, 408 US 564, 577 (1972)(holding that for a person to have a sufficient property interest in something to be entitled to constitutional protection, he must "have more than an abstract need or desire for it' He must have more that a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it.") Plaintiff suggest that this alleged entitlement is created by the sections of New York City Rent Stabilization Law ("RSL"), N.Y. Uncon. Laws §§ 26-501 to 26-520 (West 1999) and the DHCR's Rental Stabilization Code ("RSC") N>Y> Rent Stab. §§2520.1 to 2530.1(McKinney Supp 1999), based thereon pertaining to harassment complaints. RSL § 26-516(c)(2) provides in relevant part that "[i]f an owner is found by the DHCR commissioner...to have harassed a tenant to obtain a vacancy of his or her housing accommodation, the commissioner may

impose by administrative order after hearing a civil penalty for any such violation... Such order shall be deemed a final determination for the purposes of judicial review." (Emphasis added.) RSL §26-516(h) provides in relevant part that "the DHCR may, by regulation, provide for administrative review of all orders and determination issued by it"" RSC §2526(2)(a) provides that if an owner is found by the DHCR ... to have harassed a tenant to obtain a vacancy of a housing accommodation, the DHCR may impose by administrative order after holding a hearing [various fines]. Such order shall be deemed a final determination for the purposes of judicial review... RSC §2527,5 entitled Preliminary action by the DHCR," provides in relevant part that "at any stage of a proceeding [instituted by a tenant complaint or application] the DHCR may; (a) reject the application or complaint if it is insufficient or defective; (b) make investigations of the facts, conduct inspection, hold conferences, and require the filing of reports, evidence, affidavits, etc, or grant or order a hearing... Similarly, RSC 2527.6 provides in relevant part that the DHCR on such terms and conditions as it may determine may, (a) dismiss the application or complaint if it fails to substantially comply with the provisions of the RSL or the RSC, or grant or deny the application in whole or in part..."

It is evident form these provisions that eh New York State Legislature intended to confer a great deal of discretion on the DHCR in regard to the processing of harassment complaints. Although RSC § 2527.5(h) confers on DHCR administrators the authority ot order a formal hearing on a tenant's harassment complaint - neither this provision nor

any other mandates the ordering of such a hearing. This conferral of broad discretion proves fatal to Plaintiff's claim against Defendant Mulholland. It is well established that where such discretion has been conferred, no entitlement has been created. See Billager Pond, Inc. v Town of Darian, 56 F3d 375, 378(2d Cir 1995), cert denied, 493 US 893 (1989)("A clear entitlement, and, in turn, a constitutionally protected property interest, exists only when "the discretion of the issuing agency is so narrowly circumscribed that approval of a proper application is virtually assured."). Hence, Plaintiff wold have a property interest in a formal hearing on his harassment complaint resulting in a final order subject to judicial review only if - contrary to fact - the discretion conferred by the Legislature on the DHCR were so narrowly circumscribed that the ordering of such a formal hearing were virtually assured.

In short, the above-quoted provisions do not confer on harassment complaints the right to a formal hearing on their complaints resulting in a final order subject to judicial review.[foot note 3]

----------footnote 3 ----------

It does not follow from this conclusion that the State provided no forum to adjudicate Plaintiff's claims. (Comp ¶ 5.) As noted. on April 1, 1996, Plaintiff filed suit in New york Supreme Court against Defendant Sanders, Defendant Sanders' real estate company, and Defendant Pinner. Furthermore, insofar as Plaintiff is alleging a partial or complete eviction, (see Comp ¶¶11,13), the DHCR's Rent and Eviction Regulations provide for "civil action by tenant for unlawful eviction or for surrender of

possession as a result of harassment." NYC Rent ¶ Evict. Law § 2206.9(McKinney Supp 1999). Having originally elected to file a harassment complaint with the DHCR - rather that to bring suit in New York State Supreme court - Plaintiff constructively relinquished direct control over his claim. Cf Crimmins v Handler & Co., 671 N.Y.S.2d 469(1st Dept 1998)(holding that "where a claim has been filed by the tenant of a rent stabilized housing unit with DHCR, the question of rent overcharge or enforcement of the resulting order are matter wholly within the province of the administrative agency" - in contrast to "rent overcharge claims advanced by tenants...who... commence an action in a court of competent jurisdiction")

---------- end of footnote ----------

Hence, Defendant Mulholland's decision to close the inquiry into Plaintiff's harassment complaint without ordering a formal hearing thereon did not violate Plaintiff's due process rights. [footnote 4]

----------footnote 4 ----------

Having found that Defendant Mulholland is entitled to judgment as a matter of law on the issue of whether Plaintiff has sufficiently alleged a violation of his constitutional rights, we need not reach Defendant Mulholland's Burford abstention argument.

----------end of footnote ----------

III. Plaintiff's Motion for Reconsideration

Plaintiff styles his submission in opposition to Defendant Mulholland's Motion for Summary Judgment a "Cross-Motion for Reconsideration and Summary Judgment in Plaintiff's Favor." Although

the Federal Rules of Civil Procedure do not recognize a "motion for reconsideration" in haec verba, courts generally treat a motion so denominated either as a motion to alter or amend judgment, under FRCP 59(e), or as a motion for relief from judgment or order, under FRCP 60. Under which rule the motion falls depends upon the time at which the motion is filed. If the motion is filed within ten days of rendition of judgment, it is treated as a motion to alter or amend; whereas, if it is filed after that time, it is treated as a motion for relief from judgment. See 11 Wright, Miller & Kane, Fed Prac & Proc § 2817, at 184 & note 16(1995 & Supp 1999)(citing cases). As Plaintiff's Cross-Motion was not filed until September 1, 1999 - thai is, more than ten days after our Memorandum and Order of March, 23, 1999 - we treat his Motion for Reconsideration as a notion for relief from judgment or order under FRCP 60.

Plaintiff's Motion for Reconsideration appears to be concerned exclusively with the statute of limitations holding of our previous Memorandum and Order. Specifically, Plaintiff disputes our labeling of his "action only as a civil rights action with a three year statute of limitations." (Pl's Cross-Motion ¶ 1). Plaintiff argues that various of his state common law claims are subject to statutes of limitations longer than three years. Specifically, Plaintiff argues that his claim that he was illegally evicted from a portion of his apartment is governed by the "ten year statute of limitations for bringing action [sic] to recover real property or it's [sic] possession,"(Id. ¶(citing NY CPLR§213(a))). Third, he argues that his claim that Defendant Pinner "infected the proceedings[on his harassment

complaint] with fraud" is governed by a six year statute of limitations.(see id ¶2.)

These statute of limitations arguments in support of reconsideration do not appear to fall into any of the categories of reasons for reconsideration set out in FRCP 60. Mindful of Plaintiff's pro se status, however, we consider these nevertheless.

These argument are misguided because they fail to take into account the fact that Plaintiff's Section 1983 claims are properly before this Court only because they are pendant to Plaintiff's Section 1983 claims. See 28 USC § 1367. In our previous Memorandum and Order, we dismissed Plaintiff's Section 1983 claims that Defendants Pinner, Mulholland, Tornicasa, and Berry prevented the fair processing of Plaintiff's harassment complaint on the ground that it was barred by the applicable three-year statute of limitations. In light of this dismissal, we declined to exercise supplemental jurisdiction over those of his state claims closely related to this "prevention of fair processing" claim. As Plaintiff's fraud claim against Defendant Pinner clearly falls into this category, his argument in support of a sex-year statute of limitations for this claim fails.

As for his argument in support of a six-year statute of limitations for his claims seeking equitable and injunctive relief, Plaintiff requested equitable relief against Defendant SAnders and Pinner in his Complaint. (See Comp at 5.) As his request for equitable relief against defendant Pinner appears to be based on his claim that Pinner prevented the fair processing of his harassment complaint - i.e., the very claim we dismissed in our previous Memorandum and Order - this part of his

argument of a sex-year statute of limitations fails. (footnote 5)

---------- footnote 5 ----------

We need not consider the parallel claim for equitable relief against Defendant Sanders in the context of Plaintiff's Motion for Reconsideration, as we did not consider any of Plaintiff's claims against Sander in our previous Order and Memorandum.

---------- end of footnote ----------

Conclusion

In light of the foregoing, the court grants both Defendant SAnders' Motion to Dismiss and Defendant Mulholland's Motion for Summary Judgment, and denies both Plaintiff's Cross-Motion for Summary Judgment and Motion for Reconsideration. The Complaint is therefore dismissed in its entirety and the clerk shall close the case.

SO ORDERED

Dated: New York, New York
December 14, 1999

Leonard B. Sand
U.S.D.

State of New York
Division Of Housing And Community Renewal
Office of Rent Administration
Gertz Plaza
92-31 Union Hall Street
Jamaica, New York. 11433
IN THE MATTER OF THE ADMINISTRATIVE APPEALS OF

TEN BE OR NOT TEN BE Inc. &
STEPHEN DIBBS

PETITIONERS

ORDER AND OPINION GRANTING PETITION UNDER DOCKET NO. NF410075RO AND DENYING PETITION UNDER DOCKET NO. NG410013RT FOR ADMINISTRATIVE REVIEW.

On various dates, the above-named owner and tenant filed petitions for administrative review (PARs) against an order issued on June 2, 1999 by the Rent Administrator, concerning the housing accommodations known as 155 Avenue B, AKA 246 East 10th Street, New York, New York, ground floor apartment, wherein the Rent Administrator granted the owners application for a decrease in a required service.

The owner of the subject premises initiated this proceeding on May 27, 1994, by filing an application requesting the Division's permission to remove s security gate across a storefront of the subject premises which provides access to the store which is

now an area used as an apartment. The owner's application claims that the owner is required to remove the security gate, as a matter of law, since the New York City Department of Housing, Preservation and Development (HPD) cited the owner for a violation, as the security gate obstructed the fire egress to this street level apartment. The application further claims that the Division's Enforcement Unit, in the proceeding HG-419985-HL, directed the owner to apply to the Division for permission to eliminate the security gate service.

The Rent Administrator, in the order Docket No. IE410008OD, granted the owner permission to eliminate the security gate service and decrease the rent on the subject apartment in the amount of $27 as follows: $10.00 for the loss of storage area, $2.00 for the removal of gate, $10.00 for the loss of private space, and $5.00 for the accumulation of debris and garbage.

The owner in it's PAR claims, in substance, that the loss of private space and the loss of storage space involves the same area between the prior gate to the apartment storefront, therefore, a $10.00 decrease for the loss of this space should not be assessed twice; and that the $5.00 decrease for the accumulation of garbage and debris is not warranted.

The tenant in his PAR, claims, in substance and in pertinent part, that the $27.00 rent reduction don not compensate the tenant for discontinuance of his use of the storefront area and for the reduction in security; that removal of the gate allows trespassers

to frequent and leave trash in the area; that the security fence could have been replaced with a gate door; that the owner could have created another access to the apartment; and that the owner is harassing the tenant.

The owner answered the tenant's PAR, stating in substance, that the subject proceeding is a result of compliance with a HPD violation which required the removal of the gate; that the tenant filed a harassment and rent reduction case subsequent to the gate removal; that the owner attempted to notify the tenant of the pending gate removal by regular and certified mail; that the tenant kept items used in his locksmith business in the area between the gate and the entrance to the storefront; and that the tenant refused the owner access to make necessary repairs.

After careful consideration of the entire record, the Commissioner finds that the petition under Docket No. NF4100175RO should be granted and petition under Docket No. NG410013RT should be denied.

Sections 2522.4 (d) and (e), of the Rent Stabilization Code (Code) requires the landlord to maintain required services included in the maxim rent of the rent stabilized apartments unless and until the owner files an application with DHCR to decrease or modify said required services and an order permitting such decrease or modification has been issued.

In the owner's modification/decrease in services

application, the owner requested that a security gate be removed as a required service on the grounds that service was eliminated due to the application of law.

A review of the record indicates that a locking security gate was in place across the open area from the sidewalk line to the storefront wall of the subject building in which the tenant-petitioner inhabits the ground floor storefront as a residence. It is undisputed by the parties that the security gate was a HPD violation because it obstructed the fire egress from the tenant's apartment.

The owner's application included a letter from the Enforcement Unit dated February 9, 1994 that set forth the disposition of the tenant's harassment complaint (Enforcement Case No. HG-410085-HL) against the owner. Said disposition among other things required the owner to file an application, pursuant to section 2522.4(d) of the Rent Stabilization Code, for a reduction in the legal regulated rent based on the elimination of the security gate service.

Section 2522.4 (d)(2) of the Rent Stabilization Code allows an owner to file a application to decrease required services for a reduction of the legal regulated rent on the grounds that such decrease is required for the operation of the building in accordance with the specific requirements of law. Section 2522.4(d) also states that a service decrease pursuant to paragraph (2) may take place prior to such approval.

As for the claim in the tenant's PAR that another form of gate with a door should be installed to replace the prior illegal security gate, the Commissioner notes that the evidence in the record below including the letters from the harassment proceeding does not support the contention that the installation of a new type of gate with a door would result in HPD approval.

In this instant case, the Rent Administrator granted the owner's application to eliminate the gate service on the basis that the HPD violation required its abatement. The Commissioner notes that in a letter from the Enforcement Division dated January 24, 1994, the tenant was informed by courtesy copy that his suggested installation of stationary bars and security gate door was reviewed and rejected as unacceptable by HPD. The Enforcement Unit's determination, set forth in the letter dated February 9, 1994, rejected said option based upon the HPD's assessment. The Enforcement Unit did, however, require the owner to remove the plywood from the subject apartment window and outer door; repair the window glass with a safety glass and install stationary exterior security bars over the window; to restore the outer door to properly operating condition; and to filed the subject application for a decrease in rent based upon the elimination of security gate service.

Therefore, that under the circumstances of this case and due to the HPD violation determining that the security gate was illegal, the Commissioner finds that the Rent Administrator did not err in granting

the decrease in service with the commensurate reduction in rent.

As for the owner's PAR, the Commissioner notes that the Rent Administrator reduced the tenant's rent by $10.00 for the loss of storage space and by $10.00 for the loss of personal space for the semi-open area that was between the gate and the shorefront entrance to the tenant's apartment. The commissioner notes that both parties do not dispute that the tenant has access and use of the area. However, the commissioner notes that however the area was used by the tenant the Rent Administrator should have limited the rent decrease to the amount of $10.00 for the loss of the incidental use of this area due to the removal of the gate.

As for the decrease of rent for the trash and debris accumulation in this area, the Commissioner finds that said accumulation has only a specious connection to a security gate service. The owner has the responsibility to keep the ground of the subject premises clean and secure for all tenants. The Commissioner, therefore, finds that the Rent Administrator was incorrect to decrease the tenant's rent by $5.00 for the accumulation of trash and debris.

Therefore, in accordance with the Rent Stabilization Law and Code, it is

ORDERED, that the petition under Docket No NF410075RO is granted and the petition under Docket NG410013RT is denied; and that the Rent

Administrator's order is modified to revoke the $10.00 rent decrease for storage use and to revoke the $5.00 rent decrease for trash and debris accumulation, leaving total decrease in rent of $12 for the elimination of security gate service and the appurtenant area.

ISSUED: FEB 08 2000.

PAUL A. ROLDAN
Deputy Commissioner

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY O NEW YORK: IAS PART 32

STEPHEN DIBBS,

Petitioner, Index no. 124062/99

JOHN MULHOLLAND, administrator
for New York State Division of Housing
And community Renewal, (DHCR),
ERNEST TORNINCASA, Deputy Chief
Inspector for New York City Department
Of Housing Preservation and Development,
TEN BE OR NOT TEN BE (landlord),
TIM SANDERS (landlord),
LAWRENCE PINNER,(landlord's architect)

Respondents.

CAROL E. HUFF, J.:

In this Article 78 proceeding, pro se petitioner seeks relief in connection with the allegedly wrongful deprivation of part of his living space resulting from the removal of a security gate. Respondents Ernest Torinincasa, by New York City Department of Housing Preservation and Development ("HPD"), John Mulholland, by New York State Division Of Housing and Community Renewal("DHCR") and Lawrence Pinner cross-move to dismiss the petition.

The relief requested by petitioner is scattershot and largely duplicative of relief sought by him in other actions. In March 1998, petitioner commenced an action in the United States District Court for the Southern District of New York, against most of the same parties based on the same factual background. Dibbs v Tornincasa, Index No 98 Civ 2102. the complaint in that action was dismissed by decision dated March 23 and December 14, 1999.

Also in 1998, petition filed an action against the non-governmental respondents in supreme Court based upon the same factual background. Dibbs v Ten Be or Note Ten Be, Inc., Index No 105918/96. That action has been temporarily stayed.

The petition is denied as to Ten Be or Not Ten Be, Inc., and Lawrence Pinner. These respondents are non-governmental parties who are plainly not subject to Article 78 proceedings in this context. See CPLR 7802.

The petition is also denied as to Tornincasa and DHPD. While is is difficult to discern from the petition what cause of action is being asserted, claims based upon the same factual background were, in any event, dismissed as time-barred by the District Court in it's March 23, 1999 decision.

Finally, the petition is denied as to Mulholland and DHCR. To the extent that petitioner's claims were not dismissed by the District Court in it's March and December 1999 decisions, the claims were the subject of a pending petition for administrative review("PAR") before the DHCR. The PAR was decided on February 8, 2000, subsequent to the filing of this proceedings, rendering moot that remaining portion of the petition.

Accordingly, the petition is denied and the proceeding is dismissed. Petitioner is given leave to however, to file a new petition with respect to the February 8, 2000 DHCR determination.

This constitutes the decision and judgment of the Court.

Dated: Apr 06, 2000 Carol E. Huff

J.S.C.

FILED
APR 28 2000
COUNTY CLERK'S OFFICE
NEW YORK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY O NEW YORK: IAS PART 32

STEPHEN DIBBS,

Petitioner, Index no. 124062/99

JOHN MULHOLLAND, administrator
for New York State Division of Housing
And community Renewal, (DHCR),
ERNEST TORNINCASA, Deputy Chief
Inspector for New York City Department
Of Housing Preservation and Development,
TEN BE OR NOT TEN BE (landlord),
TIM SANDERS (landlord),
LAWRENCE PINNER,(landlord's architect)

Respondents.

CAROL E. HUFF, J.:

Petitioner pro se moves to amend his petition and to be granted leave to respond to allegedly new material in respondent's reply papers. This motion was served however almost two weeks following the denial of the petition in this Court's decision dated April 6, 2000, and more than a month following the filing of respondent's reply. Accordingly, the motion is denied.

In moving to amend, petitioner seeks to challenge DHCR's new determination only. Since petitioner filed this motion within the sixty-day limitations period for an Article 78 proceeding, petitioner is given leave to file a new petition, based upon the February 8, 2000 DHCR determination, within thirty days following service of notice of entry of this decision.

This constitutes the decision and judgment of this court.

Dated Jul 11, 2000.

CAROL E. HUFF

J.S.C.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

STEPHEN DIBBS

PLAINTIFF,

-against-

ERNEST TORNINCASA, Deputy Chief Inspector for the New York City Department of Housing Preservation and Development(HPD), R. Berry, Inspector for HPD, JOHN MULHOLLAND, Administrator for New York State Division Of Housing and Community Renewal, TIM GREENFIELD-SANDERS, landlord, LAWRENCE PINNER, architect,

Defendants.

----------x

US Distinct Court
FILED
APR 14, 2000
S.D.N.Y

ORDER

00 Civ. 2734

SAND, District Judge,

Plaintiff appears to bring the present action in response to a February 8, 2000 final order of the New York state Division of Housing and Community Renewal ("DHCR"), allowing his a $12 per month rent reduction. Compl. ¶¶ 23. 24. In view of the fact that the DHCR's order instructs Plaintiff that his right to appeal the order lies in the New York Supreme Court, (through the bringing of an Article 78 proceeding), see id, Ex 2, and the absence of any basis for the assertion of federal jurisdiction at this time, the Complaint is dismissed for lack of subject matter jurisdiction.

SO ORDERED

Dated: New York, New York
April 14, 2000

Leonard Sand
U.S.D.J.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------x

STEPHEN DIBBS

Petitioner, Index No 118708/00

-against-

JOHN MULHOLLAND, NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL,

Respondents.

----------x

PRESENT; EILEEN BRANSTEN,J.

Motion sequence nos. 1 and 2 are consolidated for disposition.

In this amended Article 78 petition (motion seq. no. 1), petitioner Stephen Dibbs, a tenant in a rent stabilized apartment who is appearing pro se ("petition"), seeks an order 10 "restor[ing] me to private possession of the sixty square feet of my apartment that the landlord caused a partial eviction'" 2) awarding petitioner compensatory and punitive damages against his landlord and the landlord's architect for their alleged harassment of the petition; 3) awarding damages against respondent New York State Division Of Housing and Community Renewal (the "DHCR"), for its alleged resp[onsibility "for the damages the landlord has caused me"; 40 to the extent petitioner raises issues outside of the court jurisdiction, transferring this action to the Appellate Division or the Court of Claims; 5) awarding petitioner injunctive relief so

that petitioner "may be restored to the status quo"' 6) awarding petitioner compensatory, punitive and triple damages (presumably against his landlord) for his landlord's entry to petitioner's apartment, allegedly without petitioner's consent;7) awarding petitioner damages for the landlord's alleged willful failure to repair petitioner's apartment; 8) awarding petitioner compensatory and punitive damages for the DHCR;s alleged "official misconduct"' and 9) annulling the DHCR;s determination to award petitioner a $12 per month rent reduction based upon his reduction of services complaint.

In motion sequence no 2, petitioner moves to "supplement" his petition, for discovery and a jury trial, and for a stay of the Article 78 proceedings pending resolution of his appeal to the Second Circuit of a prior pending action between these and other parties.

In he petition petitioner recites a tortured history of disputes between him and his landlord dating back to 1984. Petitioner claims that his landlord has harassed his and has partially evicted him from part of his apartment, and that various city and state agencies, including respondent DHCR, have compounded his plight with an incomplete, shabby and prejudicial investigation" into his complaints. See Petition.

In June 1993, petitioner filed a harassment complaint and a reduction of services complaint with the DHCR. In addition, over the years Petitioner has apparently also filed at least two other complaints with the DHCR. In 1994 the DHCR closed the harassment complaint. the petitioner then filed a petition for administrative review objecting to the

closure of his harassment complaint. Petitioner also commenced an Article 78 proceeding to challenge the DHCR;s closure of the harassment complaint (the "first Article 78 Proceedings").

By order dated February 14, 1995, Justice Lobis denied and dismissed the First Article 78 Proceeding, noting that the DHCR's decision to close the harassment complaint was discretionary, and that the petitioner's petition for administrative review had not yet been resolved. See Dibbs v Mulholland, Sup. Ct. N.Y. Co., Index No. 124617/94. The Appellate Division, First Department affirmed dismissal of the First Article 78 proceeding. See Dibbs v Mulholland, 232 A.D.2d 346 (1st Dept 1996).

Next, in 1998, petitioner commenced an action in the United States District court for the Southern District of New York (the "First Federal Action"). In he First Federal Action, the petitioner made many of the same allegations as are set forth in the petition in this Article 78 proceeding. see Dibbs Aff., Exh. 2. By memoranda and order dated March 23 and December, Judge Sand dismissed the First Federal Action. Petitioner has appealed Judge Sand's decision to the Second Circuit. See Dibbs Aff., Exh. 3.

In 1999, petitioner brought a second Article 78 proceeding in this court against petitioner's landlord, certain other private individuals with whom petitioner had contact, the DHCR, and various government official (the "Second Article 78 Proceeding"). In the Second Article 78 proceeding, petition repeated the allegations set forth in the Federal Action, the First Article 78 and this Article 78 proceedings.

By decision and order dated April 6, 2000,

Justice Huff dismissed the Second Article 78 Proceedings against the non-governmental entities, because their are not subject to Article 78 relief. Justice Huff then denied the petition as to the DHCR and the various government official, finding that petitioner's claims had already been dismissed as time-barred in the First Federal Action, and in addition, were subject to a petition for administrative review before the DHCR.

However, Justice Huff gave petitioner leave to file a new Article 78 proceeding with respect to the DHCR's February 8, 2000 decision on the petitioner's petition for administrative review of one of his earlier DHCR complaints. see Dibbs v Mulholland, Index No 124062/99. Petitioner has appealed Justice Huff's April 6, 2000 decision to the Appellate Division first department. See dibbs Aff., Exh 4.

In April 2000, petitioner commenced a second action in the United States District Court for the Southern District of New York, Challenging he DHCR's February 8, 2000 decision on his petition for administrative review. See Dibbs v Tornicasa, Docket No 00 Civ 2734 (the "second federal action"). By order dated April 14, 2000, Judge SAnd dismissed the Second Federal Action for lack of subject matter jurisdiction.

As stated above, in this Article 78 proceeding, petitioner recites the same claims, starting from 1984, as hs recited in the first and second Article 78 Petitions and in the First and Second Federal Actions. Compare, e.g., Petition and complaint in the Federal Action, Dibbs Aff., Exh. 2. Petitioner also alludes to the DHCR's February 8, 2000 order, but petitioner does not include a copy of the DHCR;s

February 8, 2000 order with the Article petition.

In the motion, petitioner seeks a stay of this Article 78 petition to allow the Second Circuit to resolve petitioners appeal from Judge Sands dismissal of the Second Federal Action for lack of federal subject matter jurisdiction. Petitioner also seeks to add a claim concerning a second DHCR order, dated September 14, 2000. In the September 14, 2000 order, the DHCR denied petitioner's petition for administrative review of the February 4, 2000 order of the Rent Administrator, in which the Rent Administrator granted petitioner's landlord's application for rent restoration. Finally, petitioner seeks discovery and a jury trial on the wide myriad of claims pled in this Article 78 proceeding.

As Justice Huff held, the only permissible basis for this article 78 proceedings is the February 8, 2000 DHCR order. All of petitioner's allegations and claims have been raised to other courts in other suits. However, petitioner did not include a cop of the February 8, 2000 order, so it is impossible for this court to determine whether the DHCR's order "was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion" (CPLR 7803(3); see also, Scherbyn v Wayne finger Lakes Board, 77 NY2d 753, 758 (1991).

Accordingly, this petition is dismissed without prejudice to renewal, so long as petitioner confines his claims to those surrounding the DHCR's February 8, 2000 order, and any subsequent DHCR orders which have not been the subject of other suits (such as the DHCR's September 14, 2000 order).

In light of the dismissal of this Article 78

proceeding, petitioner's motion for a stay and other relief is denied as moot.

In accordance with the foregoing, is

ORDERED that petitioner's motion for a stay and other relief is denied; and is is further

ORDERED that ADJUDGES that the petition is denied and the Article 78 proceedings is dismissed without prejudice.

This constitutes the decision, order and judgment of the Court.

Dated: New York, New York
April 16, 2001

ENTER
Hon. Eileen Bransten

FILED
MAY 15, 2001
COUNTY CLERK OFFICE
NEW YORK

TEN BE OR NOT TEN BE, INC.
151 First Avenue, #155
New York, NY 10003
(212) 533-1211

DECEMBER 7,2001

Mr. Stephen Dibbs
P.O. Box 2148
New York, NY 10009

Dear Mr. Dibbs

You will be pleased to know that we obtained the attached permit to convert your space to a legal apartment, as you have requested in your court documents in the last year.

As you can see on the attached plan, the work will entail adding a kitchen, replacing the plate glass with operable windows, replacing the shower with a bathtub, adding a bathroom sink and two radiators and moving some walls and doors. You will end up with more space after the conversion is complete.

In addition, you will be pleased to see that we have obtained permission to erect a low fence with a swing gate at the Avenue B entrance to your new apartment.

Our workmen will be starting this conversion on January 2, 2002. Please be there to let them in the first thing in the morning, or leave a key with Reino, the super.

We look forward to getting this work done and to putting all the years of litigation and unpleasantness behind us.

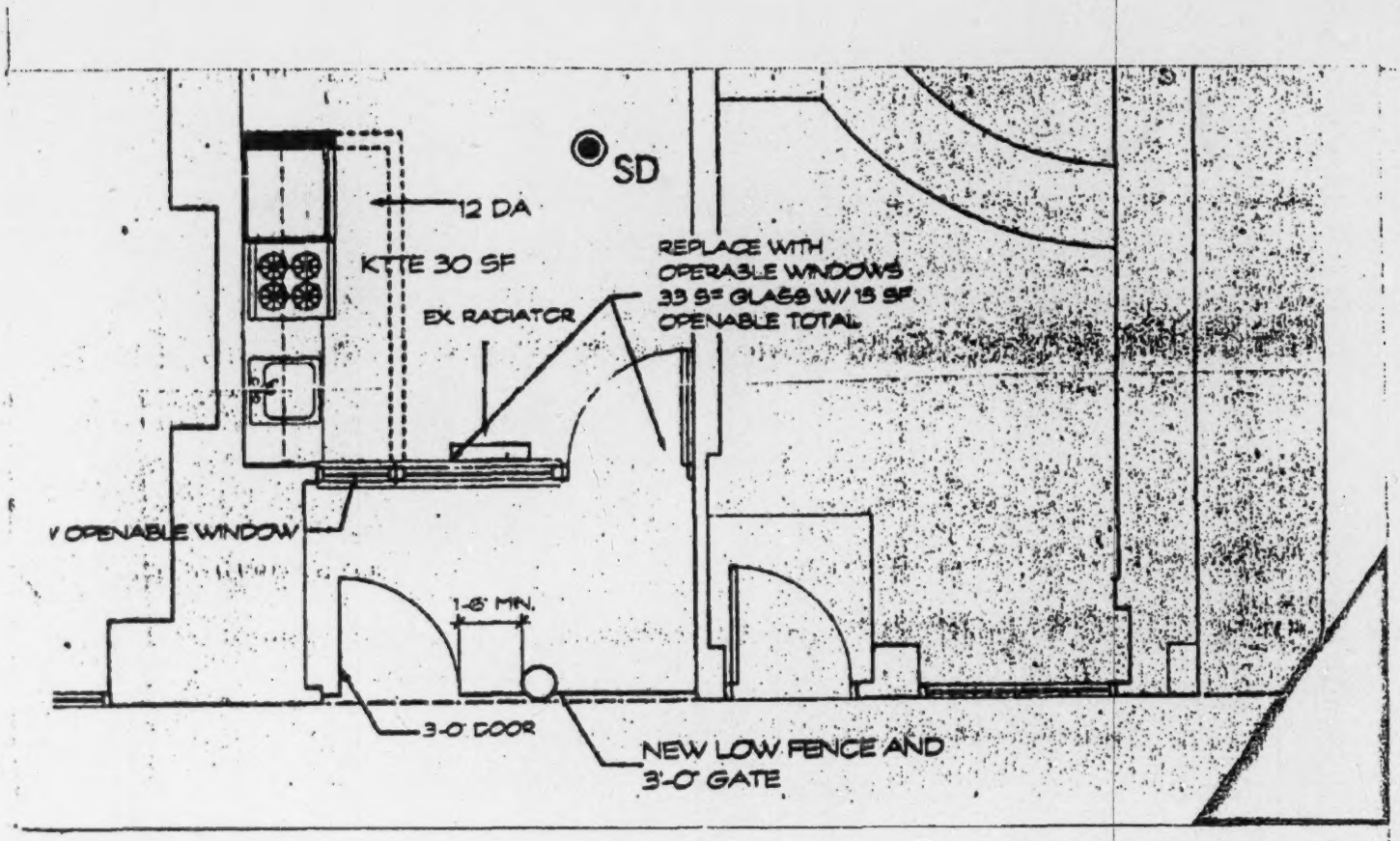
Wishing you the best for the holidays.

Sincerely,
Karin Greenfield Sanders
Vice President

THE CITY OF NEW YORK
WORK PERMIT

DEPARTMENT OF BUILDINGS

PERMIT NO. 1029899446-AL
ISSUED 12/06/01 EXPIRES 06/11/02
LOCATION MANHATTAN 155 AVENUE B
APPROVED 11/27/01
WORK ALT 1 - Convert existing commercial at first floor to residential unit. Interior
ZONING R7-2 SPECIAL DISTRICT N/A
USE RESID. BLDG OLD CODE
NO OF DWELLINGS 00017 STORIES 5
TOTAL FLOOR AREA 000000010
LANDMARK NO
[illegable name] COMMISSIONER OF BUILDINGS
[illegable name] BOROUGH SUPERINTENDENT
EMERGENCY TELEPHONE 212 227-7000
NIGHTS AND WEEKENDS 212 312-8298


SD
12 DA
KITE 30 SF
EX. RADIATOR
REPLACE WITH
OPERABLE WINDOWS
33 SF GLASS W/ 15 SF
OPENABLE TOTAL
V OPENABLE WINDOW
1'-6" MIN.
3'-0" DOOR
NEW LOW FENCE AND
3'-0" GATE

292 A.D.2D 164; 738 N.Y.S.2D 203; 2002 N.Y. APP. DIV. LEXIS 2276

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION, FIRST DEPARTMENT

----------x

STEPHEN DIBBS,

Appellant-Respondent

v

JOHN MULHOLLND, administrator for New York State Division of Housing and Community Renewal (DHCR), Ernest Tornincasa, New York City Department of Housing Preservation and Development ("HPD"), et al.

Respondents.

----------x

OPINION:

Judgments, Supreme court, New York County (Carol Huff, J.), entered April 28 and July 28, 2000, which, inter alia, denied petitioner tenant's application pursuant to CPLR article 78 challenging respondent State Division of Housing and Community Renewal's processing of and determination to close tenant's harassment complaint against respondent landlord, with leave to file a new petition challenging DHCR;s determination dated February 8, 2000 granting the landlord's application to eliminate a required service, namely, a security gate, with a reduction of rent, unanimously affirmed, without costs.

DHCR's determination to close the tenant's harassment complaint was not an abuse of its discretion (CPLR 7803(3); see, Dibbs v Tornicasa, 1999 WL 1201709,*6-7, 1999 US Dist Lexis 19195, *19-21(SDNY, Dec. 14, 1999), there being ample justification therefor in the tenant's refusal to permit the landlord access to the premises and to otherwise cooperate with the plan DHCR had formulated to remedy the safety and habitability problems largely created by the legally required removal of the unlawful security gate. DHCR's determination of February 8, 200, granting the landlord's application for a service and rent reduction is not before this court, since petitioner, although twice granted leave to do so, failed to commence a proceeding properly challenging that determination, which in any event would be now be time-barred.

March 5, 2002
ENTER
MARCH 5, 2002

Mazzarelli,J.P., Ellerin,Lerner
Rubin, Marlow, JJ.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK; PART SIX

----------x

In the Matter of the application of
STEPHEN DIBBS,

Petitioner,

-against-

JOHN MULHOLLAND, administrator for New York State Division of Housing and Community Renewal, Paul Roldan, Deputy Commissioner of New York State Division of Housing And Community Renewal, SATTISH BABBAR, Acting Commissioner of New York City Department of Buildings, TIM BREENFIELD SANDERS, and TEN BE OR NOT TEN BE, INC.

Respondents.

----------x

PRESENT: EILEEN BRANSTEN,J.

In this "Combined Article 78" proceeding-the most recent of a multitude of unsuccessful actions and proceedings-petitioner Stephen Dibbs challenges the actions and determination of respondents John Mulholland, Administrator for New York State Division Of Housing and Community Renewal, Paul Roldan, Deputy Commissioner of New York State Division Of Housig And Community Renewal (collectively the "DHCR Respondents", Satish Babbar, Acting Commissioner of New York City

Department of Buildings, Tim Greenfield Sanders and Ten Be or Not Ten Be, Inc. Dibbs seeks declaratory and injunctive relief. (foot note, 1)

Footnote 1: Pursuant to the Court's April 16, 2001 Decision and Judgment, to the extent that Dibbs seeks review of DHCR's determination, this court will limit its analysis to whether the February 8, 2000 and September 14, 2000 administrative decisions.
End of Footnote.

The respondents cross-move to dismiss the proceedings.

BACKGROUND

In 1978, Dibbs rented commercial storefront property in New York City that was to be used as his apartment. He is a rent-stabilized tenant. In 1984 the building was purchased by respondent landlord Ten Be of Not Ten Be, Inc. ("Ten Be") whose president is respondent Timothy Greenfield-Sanders (collectively the "Landlord Respondents").

In March 1993, Ten Be received a violation notice from the New York City Department of Housing, Preservation and Development ("HPD") for an illegal security gate that fronted Dibbs' apartment. HPD allegedly required that the gate be removed by April 22, 1993. Ten Be purportedly tried to contact Dibbs, and after no success-while Dibbs was in Florida visiting his father—removed the gate that served as the first door to the premises and boundary wall.

DHCR Involvement

In June 1993, Dibbs filed three complaints with DHCR: a harassment complaint, a reduced services complaint, and a lack of heat and hot water complaint.

Thereafter, Ten Be commenced a DHCR proceeding, requesting permission to remove the security gate across the storefront property that Dibbs used as an apartment with a concomitant rent reduction. Ten Be alleged that removal was required because the HPD had cited the gate as a housing code violation because it obstructed fire egress to the street level apartment.

In a June 2, 1999 order the Rent Administrator granted Ten Be permission to eliminate the gate (since the owner could not restore it without violation HPD rules) and ordered a $27 monthly rent reduction. See, Feb 8, 2000 DHCR Decision. The Administrator concluded that the "owner is granted permission to eliminate the service of providing [a] security gate." See, Verified Petition, Ex 14.

Through cross-petitions for administrative review (PARs), Ten Be challenged the $27 monthly reduction as did Dibbs: Ten Be arguing $27 monthly was too much and Dibbs arguing that the action was improper and that a reduction of $27 a month was too little.

Dibbs also commenced an Article 78 Proceeding challenging the allegedly wrongful deprivation of part of his living space as a result of removal of the security gate.

Subsequently, on February 8, 2000, DHCR decided the PAR's. DHCR determined that:

- There was no evidence that a new type of gate would have been approved by HPD;
- "due to the HPD violation determining that the security gate was illegal *** the Rent Administrator did not err in granting the decrease in service with a commensurate reduction in rent;"
- the Rent Administrator gave too much of a rent reduction and the rent should only have been reduced by $12 a month.

Additionally, on September 14, 2000, DHCR affirmed a Rent Administrator's determination that an unrelated rent reduction could be discontinued because services had been bully restored.

Dibbs' Lawsuits

In 1994 Dibbs commenced an Article 78 proceeding in Supreme Court, New York County (Index Number 134617/94), seeking a declaration that DHCR's treatment of his harassment complaint constituted an abuse of discretion. Because the determination of whether to issue a finding of harassment was discretionary, the petition was denied. See, February 14, 1995 Decision and Order of Justice Joan B. Lobis. The dismissal was affirmed by the Appellate Division and leave was denied by the Court of Appeals. See, Dibbs v Mulholland, 232 A.D.2d 346 (1st Dept 1996, lv. Denied 90 N.Y.2d 801 (1997), lv. Dismissed, 90 N.Y.2d 1007 (1997).

In March 1998, Dibbs commenced an action against many of the defendants named in this proceeding in the United States District Court for the Southern District of New York. Among other things, Dibbs challenged DHCR;s determination with respect to his harassment claims and asserted

Constitutional violations. See, Dibbs v Tornincasa, Index No. 98 Civ. 2102. Dibbs' complaint was dismissed.

Dibbs also commenced an action against, among others, respondents Ten Be and Tim Greenfield Sander. That action (Index Number 105918/96) was dismissed without prejudice by Decision and Order dated March 27, 2002 on he grounds that Dibbs had failed to oppose the defendant's motions to dismiss. See, March 27,m 2002 Decision and Order issued by Justice Marilyn Shafer.

Dibbs next commenced another Article 78 proceeding in Supreme Court, New York County (Index Number 124062/1999), this time alleging wrongful deprivation of his living space as a result of removal of the security gate. The petition was denied as to Ten Be and Sanders as those respondents were "non-governmental parties who are plainly not subject to Article 78 proceedings in this context." April 6, 2000 Decision and Judgment. The remainder of the petition was denied as well because the claims had been the subject of pending PAR;s that had not been decided until February 8, 2000 – after the petition had been filed. Accordingly, Justice Carol E. Huff dismissed the proceeding and granted leave to file a new petition regarding the February 8, 2000 DHCR determination. ID. In a subsequent decision, Justice Huff further clarified that since Dibbs had filed a motion to amend his proceeding to include review of the February 8,2000 DHCR determination "within the sixty-day limitations period for an Article 78 proceeding, [he was] given leave to file a new petition, based upon the February 8, 2000 DHCR determination, within thirty days following service of

notice of entry of this decision." July 11, 2000 Decision and Judgment of Justice Carol E. Huff.

Dibbs appealed the two decisions of Justice Huff. On March 5, 2002, the Appellate Division, First Department affirmed Justice Huff's determination. In its decision, the Appellate Division explained that: "DHCR determination of February 8, 2000 granting the landlord's application for a service and rent reduction is not before this court, since petition, although twice granted leave to do so, failed to commence a proceeding properly challenging hat determination, which, in any event would now be time barred." See, Dibbs v Mulholland, 292 A.D.2d 164, 164 (1st Dep't 2002).

In the interim, however, Dibbs had already commenced another Article 78 proceeding (Index Number 118708/00), which was assigned to this court. (footnote 1)

Footnote: Dibbs had also commenced an action in the United States District Court, seeking review of the February 8, 2000 DHCR determination. Because Dibbs had Article 78 review available in New York State courts, his complaint was dismissed for lack of subject matter jurisdiction.
End of Footnote.

The Court further explained that Dibbs alluded to the DHCR February 8, 2000 order but failed to include a copy with his Article 78 petition. "Accordingly, [his] petition [was] dismissed without prejudice to renewal, so long as petitioner confines his claims to those surrounding the DHCR;s

February 8, 2000 order, and any subsequent DHCR orders which have not been the subject of other suits (such as the DHCR;s September 14, 2000 DHCR order)." April 16, 2001 Decision, Order and Judgment.

This Proceeding

In this proceeding , Dibbs challenges three actions: (1)DHCR's approval of removal of the security gate and monthly rent reduction, (2) the Department of Building's issuance of a work permit, and (3) his landlord's conduct.

Allegations in Petition

According to Dibbs, "the central issue of this case is requiring my Landlord and the New York Division of Housing And Community Renewal to correct partial evictions in the front and rear of my apartment." Verified Petition, at paragraph 65. Dibbs complains that in removing the security gate, Ten Be and Sanders caused him to be partially evicted, violated the warranty of habitability and "allow[ed] homeless people, youth gangs and public urination in a portion of [his] apartment, violated [his] rights of exclusive possession and quiet enjoyment." Id., at para 66. Dibbs further contest the $12 monthly rent reduction, arguing that it is not an adequate remedy for the loss of part of his apartment. Id., at para. 67. In addition, he argues that it was not for DHCR to determine that the gate was a safety violation and could peoperly have been removed; the Department of Buildings was vested with that power. Id., at para. 70. Dibbs also argues that the rent-reduction order "is an Unconstitutional regulatory taking of [his] property, serving no legitimate governmental purpose." Id., at para 71

Dibbs, moreover, alleges that on December 11, 2001, his landlord, respondent Ten Be informed him that a work permit had been approved by the Department of Buildings. According to Dibbs the permit authorized construction that would "evict" him from a portion of his premisses constituting a trespass and partial eviction. Dibbs further maintains that the "landlord's plans, unilaterally alter the conditions of the apartment, under which the lease was signed***and the plan unnecessarily requires the demolition and repositioning of walls, bathroom and kitchen area." Verified Petition, at para 28. Dibbs further complains that the construction plan envisions a "low fence and 3 foot gate, which is insufficient to preserve the quiet enjoyment of his premises. Id., at para 30.

As against the Landlord Respondents, Dibbs alleges that Timothy Greenfield Sanders – and presumably Ten Be – "is responsible for willfully refusing to make required repairs in a continuing course of illegal and harassing actions against the petitioner." Verified Petition, at para. 5.

Opposition

In response, the DHCR Respondents argue that the current petition should be dismissed because (1) it was not filed within 60 days of issuance of the final administrative determination as required by Rent Stabilization Law, section 26-516d, and the Appellate Division has already determined it is untimely, (2) insofar as the petition raises issues litigated in prior actions it should be dismissed on collateral estoppel and res judicata grounds, and (3) DHCR's determination was rational and should be affirmed.

Respondent Satish Babbar-Acting Commissioner of New York City Department of Buildings—opposes the petition to the extent that it alleges that issuance of the work permit was improper on the grounds that Dibbs failed to exhaust his administrative appeals by bringing his claim before the City Board of Standards and Appeals ("BSA").

Finally, the Landlord Respondents argue that the action should be dismissed against them on collateral estoppel and res judicata grounds.

Analysis

It is elementary that generally before a court can review an administrative determination pursuant to Article 78, the petitioner must have exhausted all administrative remedies. See, Watergate II Apartments v Buffalo Sewer Auth., 46 N.Y.2d 52, 57 (1978). Indeed, the exhaustion doctrine "furthers the salutary goals of relieving the court of the burden of deciding questions entrusted to an agency, preventing premature judicial interference with the administrator's efforts to develop, even by some trial and error, a coordinated, consistent and legally enforceable scheme of regulation and affording the agency to opportunity in advance of possible judicial review, to prepare a record reflective of its "expertise and judgment."

In the same vein, judicial reversal of an administrative order pursuant to CPLR Article 78 is limited to instances where the agency acted arbitrary or capriciously. Matter of Pell v Board of Educ., 34 N.Y.2d 222, 231-232 (1974); see also, Matter of Arrocha v Board of Educ., 93 N.Y.2d 361, 363 (1999). So long as there is a rational basis supporting an

administrative order, judicial review is narrowly circumscribed and the agency's decision must be upheld. See, matter of Buzman v Safir, 293 A.D.2d 281 (1st Dept 2002), lv. Denied __ N.Y.2d __ (Oct 15, 2002).

DHCR Respondents

Even assuming, for purposes of expediency, the timeliness of this petition—notwithstanding the Appellate Division's statement otherwise (see, Dibbs v Mulholland, supra, 292 A.D.2d, at 164)—Dibbs has not come close to meeting his heavy burden of establishing that the challenged conduct was arbitrary or capricious. Significantly, on this record, there is no indication whatsoever that dibbs was entitled to exclusive use and enjoyment of the area between where the security gate existed and his apartment or that there was any governmental taking of his property by removal of the illegal gate. Moreover, to the extent that Dibbs benefited from the gate, his rent was reduced to compensate him for the loss of its use. Dibbs has not submitted sufficient evidence establishing that the monthly $12 monthly rent reduction is arbitrary or capricious. In support of his petition, Dibbs simply alleges that Ten Be's recent approval for a smaller gate proves that DHCR's determination that the initail gate must be removed was irrational. The argument entirely misses the mark DHCR simply reviewed the plans before it, ultimately deciding that the gate that had been in place constituted a hazard under HPD rules and had to removed and that Dibbs' proposed plans for a different gate were not feasible. Nothing before this court suffests that DHCR's –which was consistent with HPD's determination that the gate

was illegal and hazardous—was arbitrary, capricious or irrational.

Additionally, to the extent that the petition challenges DHCR;'s unrelated September 14, 2000 determination (eliminating a monthly rent reduction because the restoration of services), Dibbs has not established that the decision was arbitrary or capricious.

Thus, the petition must be denied in its entirety—on the merits—against John Mulholland and Paul Roldan (the New York State Division Of Housing And community Renewal respondents) and the proceedings dismissed against them.

Paul Roldan: City Department of Buildings

With respect to the Department of Buildings work permit, the Department correctly argues that Dibbs has not exhausted his administrative remedies in that he has failed to appeal issuance of the permit to the Board of Standards an Appeals ("BSA"). BSA is vested with the authority to review City Department of Buildings' determinations brought "by any person aggrieved." New York City Charter, sections 669, 645 and 666; New York City Administrative Code, section 26-250. Within a day after issuance of the work permit, Dibbs was sent a copy of the plans, which he later received. Verified Petition, Ex. 11. Nonetheless, he has failed to administratively appeal issuance of the work permit to BSA. Because the determination should have been reviewed by BSA prior to commencement of the Article 78 proceedings, this component of the petition (brought against Satich K. Babbar, Acting Commissioner for New York City Department of Buildings), must also be dismissed. See, e.g. Matter

of Wilkins v Babbar, 294 A.D.2d 186, 187 (1st Dep't 2002); Matter of Delafield 246 Corp. V Dep't of Buildings, 218 A.D.2d 613,613 (1st Dep't 1995); Matter of Sievers v. City of New York, 182 A.D.2d 580, 580 (1st Dep't 1992. Footnote 3.

---------- footnote----------

n3. Additionally, this Court cannot award relief in the nature of mandamus because the actions challenged are not simply "ministerial;" rather, they involve the exercise of discretion. See, Matter of Brusco v Braun, 84 N.Y.2d 674, 679 (1994).

Landlord Respondents

The Landlord Respondents argue that these proceedings against them are barred by the doctrines of issue and claim preclusion. This petition will be dismissed against them however, solely on the grounds that Justice Huff articulated with regard to one of Dibbs' earlier petitions: these "respondents are non-governmental parties who are plainly not subject to Article 78 proceedings in this context." See, April 6, 2000 Decision and judgment (Huff, J.) under Index Number 124062/99.

This determination is without prejudice to commencement of an appropriate action against the Landlord Respondents. This Court does not have occasion to—and does not—as confirmed by Justice Marilyn Shafer's March 27, 2002 dismissal of Dibbs complaint (Index Number 105918/96) "without prejudice," it does not appear that there has been any litigation of the merits with the Landlord Respondents.

Accordingly, it is ORDERED and ADJUDGED that the petition is denied; it is further

ORDERED and ADJUDGED that the cross-motion to dismiss are granted and this Article 78 is dismissed; and it is further

ORDERED and ADJUDGED that the Landlord Respondents' cross-motion for sanctions is denied.

This constitutes the decision, order and judgment of the court.

Dated: New York, New York
November 19, 2002

ENTER
Hon. Eileen Bransten

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

STEPHEN DIBBS,

Plaintiff,

-against-

PAUL ROLDAN, Deputy Commissioner, New York State Division Of Housing & Community Renewal.
JOHN MULHOLLAND, administrator, New York State Division Of Housing and Community Renewal.
NEW YORK STATE DIVISION OF HOUSING AND COMMUNITY RENEWAL.
DENNIS RYAN, commissioner, New York State Division of Housing And Community Renewal.
VARIOUS unspecified BUILDING INSPECTORS OF New York City Dept. Housing Preservation& Development
JERILYN PERINE, commissioner of New York City Department of Housing Preservation and Development.
PATRICIA LANCASTER, COMMISSIONER OF NEW YORK CITY DEPARTMENT OF BUILDINGS
KENNETH PODZIBA, commissioner of New York City BOARD OF STANDARDS AND APPEALS
TEN BE OR NOT TEN BE, Inc., (landlord)
TIM GREENFIELD-SANDERS (landlord)
LAWRENCE PINNER (landlord's architect)
JOAN LOBIS, New York Supreme Court Judge.

CAROL HUFF, New York Supreme Court Judge
EILEEN BRANSTEN, New York Supreme Court Judge

Defendants.

PLAINTIFF, Stephen Dibbs, pro-se, a residential tenant of New York City, protected by the Rent Stabilized Law Of 1969, (New York Law 1985, Ch 907), and the Emergency Protection Act Of 1974, (New York laws 1974, Ch. 576), comes before this court and says:

PRELIMINARY STATEMENT

1. In 1978 my original landlord rented me a Store as an unlegalized residential apartment.

2. In 1984 the building was sold to the current owner who tried to legally evict me, and also engaged a protracted course of harassment against me by withholding the legally required heat, water, ventilation, etc, and producing dangerous and illegal conditions that evicted me from portions of the apartment, and by procuring a building permit to legalize the premises, that plans to evict me from a further portion of the premises.

3. In 1993, cloaked under the authority of a HPD building Code violation, the landlord with out notice or a opportunity for me to object, forcibly entered my apartment while I was away and demolished part of the structure of my apartment, causing a partial eviction, full eviction and continuing nuisance and dangerous circumstance of homeless people, youth gangs etc., being able to enter and utilize a portion of my apartment, to my exclusion.

4. In 1993, I filed a complaint for my apartment to be restored, with the DHCR State Housing

Administration, who is required to maintain tenant services, including the "Space" of the apartment.

5. The DHCR who refused correct a partial eviction from a portion of my apartment and unreasonably and prejudicially delayed for seven years on issuing a final order, granting me a rent reduction of $12 per month for the loss of space, (partial eviction) for which I object and seek greater damages, nuisance abatement and restoral of possession of that section of my apartment. (DHCR Feb, 8, 2000 order attached as exhibit 1)

6. Beside losing a portion of the premises upon these events, the landlord more recently approved a building plan, without my participation, to legalize the space that entails an unnecessary further reduction in space.

7. The administrative proceedings used by the DHCR did not provide a hearing or restore my possession, and the HPD permit procedures exclude the tenant and do not provide **adequate state remedy** to litigate my due process and takings claims.

JURISDICTIONAL STATEMENT

8. In the first part of this Case, the Defendants, DHCR, HPD and the Landlord and his architect, acted jointly and in concert, in the DHCR proceedings that concluded with a DHCR final order, dated February,8, 2000, within the three year statute of limitations for bringing a Civil Rights Action.

9. Plaintiff brings this action pursuant to 42 U.S.C. § 1983, and general federal question jurisdiction, 28 USCA § 1331, arising from violations of my First Amendment rights of the United States

Constitution, to petition the courts and the government agencies for a redress of grievances, as well as the United State Constitution, Forth and Fifth Amendments rights for violation of my expectation to privacy, unconstitutional entry of my apartment under the cloak of police power, and taking of portions of my leasehold and the taking of my personal and household belongings.

10. Jurisdiction is overlapped and furthered by my Fourteenth Amendments rights to Notice and an opportunity to oppose government action interfering with my leasehold interest, and my rights under the 14th Amendment, to Equal Protection, and procedural and Substantive Due process.

11. I also invoke this court's powers pursuant 18 USCA §§ 1961 through 1968, as well as the court's equitable and mandamus powers, including it's power to abstain while retaining jurisdiction, pending parallel state court proceedings.

12. This court has supplemental jurisdiction over pendent state law claims.

DEFENDANTS

13. The New York State Division of Housing And Community Renewal, is the New York State Housing Agency, charged with maintaining tenant Housing standards. (hereinafter,DHCR) The DHCR is being sued in it's supervisory capacity for failing to maintain the full use of the space of my apartment.

14. John Mulholland is the DHCR administrator assigned to my housing complaints. Administrator Mulholland is being sued in his official and individual capacity for failing to keep the premises safe and for the loss of use of a substantial portion of my apartment.

15. Paul Roldan, is the DHCR director, overseeing and involved in my complaints. Paul Rodan is being sued in his official and individual capacity.

16. New York City Department of Housing Preservation And Development, is the City agency charged with maintaining tenant's housing conditions, overlapping with the DHCR and the New York City Department of Buildings.

17. Ernest Tornincasa, is the New York City Department Of Housing Preservation and Development, Deputy Inspector, who was statutorily required to assist the DHCR and acted jointly and was significantly involved in my case with the Division Of Housing and Community Renewal. Mr. Tornincasa is being sued in his individual, official, and supervisory capacity.

18. The Department of Buildings, is the agency with exclusive jurisdiction to approve structural alterations, Certificates of Occupancy, building plan approvals, and who approved illegal plans and uses an exclusionary process and policy, to prevent tenants who property is affected by their decisions, from objecting to plans which will prejudice the rights to the tenants full use of the leasehold and the equal protection of the city and state housing laws, to keep the premises in habitable conditions.

19. The New York City Board Of Standards And Appeals, reviews decisions of the Department Of Buildings and approves materials used in the building industry, including, GATE-Doors.

20. Ten Be Or Not Ten Be, Incorporated, is the landlord, and is incorporated under the laws of the State of New York, acting jointly and with significant participation, affecting the outcome of the

administrative and judicial proceedings.

21. Tim Sanders, is the president of the Ten Be Or Not Ten Be corporation, and participated and acted jointly and with significant participation with the DHCR and HPD and architect, affecting the outcome of the case. Mr. Sanders is being sued in his official and individual capacity.

22. Lawrence Pinner is the architect representing the landlord, Ten Be or Not Ten Be, incorporated, and acted jointly and with significant involvement with the DHCR and HPD in the administrative proceeding, injecting fraud and misrepresentation, affecting the outcome. Mr. Pinner is being sued for his joint participation and in his individual capacity.

23. Joan Lobis is the New York County Supreme Court Judge who ignored my constitutional claims, and obstructed and delayed emergency judicial review of unconstitutional and dangerous administrative actions. Judge Lobis is being sued in her official and individual capacity.

24. Carol Huff, is the New York County Supreme Court Judge who ignored my constitutional claims, and obstructed and delayed emergency judicial review of unconstitutional and dangerous administrative actions. Upon information and belief, judge Huff, back dated an order to administratively defeat my legitimate claims for judicial review of Unconstitutional violations. Judge Huff is being sued in her individual and official capacity.

25. Eileen Bransten is the New York County Supreme Court Judge who ignored my constitutional claims and obstructed and delayed emergency judicial review of unconstitutional and dangerous administrative actions. Judge Bransten is being

sued in her official and individual capacity.

FACTS

26. In April, 1978, I moved into the subject premises, under a Rent Stabilized residential lease.
27. The premises are a commercial storefront, which have not been legalized for residential purposes pursuant the the city and State hosing laws, on the ground floor of a five story, Old Law Tenement, at 155 Avenue B, New York City, New York, overlooking Tompkins Square Park.
28. I lived happily and comfortably under the original landlord, and never had reason to complain.
29. After the original landlord was murdered, in the winter-spring of 1984, the building was taken over by the current landlords, Ten Be Or Not Ten Be, Incorporated, with husband and wife, Timothy and Karin, Greenfield-Sanders, as President and Vice president of said company, respectively.
30. Shortly after taking ownership of the building I live in, in the winter of 1984, Landlord Sanders came to my storefront apartment and ordered me to leave by the end of the month.
31. He turned my required Heat and water off.

In 1984, he also commenced Holdover eviction proceedings in the New York City Civil Court, for living and working in a commercial storefront.
32, The court dismissed the landlord's Holdover, and the Landlord appealed to the Appellate Term of the New York State Supreme Court, who affirmed the dismissal, holding that I am a residential tenant, protected by the New York Rent Stabilization Laws of 1969 and the Emergency Tenant Protection Act of

1974. see New York Law Journal, 6/12/85, pg. 11, col 1.

33. The landlord appealed again, to the Appellate Division of the New York State Supreme Court, who, unanimously affirmed my rights to the city and state residential rent laws. Ten Be Or Not Ten Be, Inc., v. Dibbs, 117 A.D.2d 1028 (1986).

34. All during this time, I had no heat or water, because the acts of the landlord. I couldn't bath, brush my teeth or take a drink of water. The landlord turned off my electricity, but con ed came and turned it back on again, even though the building superintendent threatened up with an axe.

35. I made repeated Heat, water and Housing complaints to the city HPD and state DHCR Housing Agencies, who were confused about the status of my apartment and refused to respond to my complaints.

36. Besides withholding the Heat and water, the landlord broke open sealed doorways, allowing the neighboring commercial tenants to trespass into my residential space, in the rear private hall and connected toilet area of his apartment, violating the separation of occupancies.

37. The landlord broke the light fixtures in the rear toilet area, adding to the danger, and with the commercial trespass, unusable for residential use, or the uses reasonably intended.

38. In 1990, I began withholding my rent, as the New York State Courts, at that time, were still undecided whether a tenant could sue the landlord for repairs, or must wait for the landlord to institute a Nonpayment at which time I would be able to raise my warranty of habitability as defenses. (It was also

considered at that time that New York Civil court did not have injunctive or equitable power available to the tenant).

39. The landlord, choosing to try to harassment me out of my apartment, rather than collect rent, took no court action against me for years, creating horrendous conditions.

40. During this time, the pipes, plumbing and toilet, in my apartment, repeatedly froze and broke.

41. The landlord entered my apartment and repaired pipers so the upstairs tenants would get water, but refused to repair cracked sewer pipes that were poring raw sewage into my apartment.

The New York City Department of Housing Preservation and Development, the city agency charged with enforcing the residential heat and services laws, sided with the landlord and refused to respond to my repeated complaints.

42. In March, 1993, I wrote to the Commissioner of the City Department Of Housing Preservation and Development, complaining that his inspectors were refusing to respond to my complaints.

43. A few days later, the heat in my apartment, during these cold months, came on, and a heat inspector from HPD came and took a reading of the temperature in my apartment.

44. Then the landlord turned off the hear again, so I went to see my father in Florida, to get away from the terrible conditions in my apartment.

45. When I returned from Florida, I was shocked to see that my apartment was partially destroyed.

46. An Old Style Commercial Storefront Scissors gate, that was a fixture that acted as a boundary wall of my premisses was removed, causing a partial

eviction and exposing 60 square feet of my apartment to the sidewalk.

47. The 2 doors leading to the rest of my apartment were boarded and barricaded up, as well as the windows, causing a full illegal eviction.

48. I broke through some of the boards blocking the entrance, and resume living in the portion of my apartment that was left.

49. When I tried to inquire to the Building Superintendent and landlord, they evaded me.

50. One time, I confronted them at the garbage receptacles, and the landlord said that he had to do it because of a building code violation.

51. On June 22, 1993, I went to the offices of the New York State Division Of Housing And Community Renewal (hereinafter, DHCR), the State agency charged with maintaining tenant services.

52. After an interview by a DHCR personnel, I was instructed to fill out some forms.

53. These forms were a harassment complaint and a reduction in services complaint.

54. The DHCR, for reasons which I do not know, canceled informal hearing on two occasions, and finally, approximately 4 months after filing my complaints, held an informal conference on October ___, 1993.

55. When I arrived for the conference, it was already being held in the hallway.

56. When the conference was moved to a separate room, and I began to show John Mulholland, the DHCR administrator assigned to my case, photographs of the terrible conditions I was living under, after seeing six or seven of the photographs, he refused to look at any others, and refused to let me

talk or present my case.

57. The landlord and the witnessed he brought to speak against me were the only one's allowed to speak.

58. The landlord said that he removed the prior gate and my household belongings because of a building code violation he received.

59. I was not shown the building code violation, nor did I receive any method, manor or notice on who or how to challenge the violation.

60. Then the DHCR administrator, with the landlord, and landlord's wife and heating mechanic, went into a back room and had a private conference without me.

61. The conference was concluded, leaving me feeling violated because I didn't have an opportunity to fully present my claims, present my evidence or give a full account of dangerous events and conditions that the landlord was subjecting me to. The Administrator avoided seeing or hearing the events of harassment that would create a case against the landlord.

Strangers and drug dealers were now trespassing and using this portion of my apartment, making it unusable and dangerous to my personal safety and security.

62. The DHCR sent an inspector Levi, to my apartment, who issued an order, dated Oct. 27, 1993, requiring among other things, that an **"adequate substitute" gate be restored within 30 days**, and that the removal of the gate was a **class B, hazardous violation.**

63. DHCR administrator Mulholland, issued an order, dated October 13, 1993, stating that I am a

Rent Stabilized residential Tenant, and that "the removal of the security gate has left a large recessed area in front of the subject apartment which street people have used for shelter, and where such people have urinated and defecated creating a health hazard."

64. Administrator Mulholland's order goes on to determine that security gates were a "required service", and that the landlord had an architect who said that he could provide for the installation of one that wouldn't violate the building codes.

65. Without me being notified, the landlord sent the DHCR administrator an ex parte letter, making prejudicial statements that I was a troublesome tenant, and that I was to blame for making the apartment cold and that I obstructed repairs

66. Also, without me being notified, the landlord's architect sent the DHCR administrator ex parte letters, changing the course of the proceedings, reversing the landlord's statement in Mulholland's order, now stating that he didn't think that a security gate could be installed .

67. Instead of complying with the order of Mulholland, by submitting a report on restoring security iron work, the Architect sent at least two letters to Mulholland, stating that he didn't think that iron work was permissible, and intimidated administrator Mulholland to change his order because security:

(1). ironwork maybe impermissible

(2). would create a liability.

68. I was not sent, or made aware of these prejudicial ex parte letters by the landlord's architect until after my case was closed by the

DHCR.

69. All during this time, homeless people, youth gangs and various other people from the sidewalk were(are) using the 60 foot portion of my apartment that I was partially evicted from, to urinate, defecate, graffiti, try to break through my apartment door, drink alcohol, sell drugs, etc.

70. These acts and people were committing criminal and illegal acts, and subjecting me to a continuing dangerous nuisance.

71. Contrary to the landlord's false accusations, the landlord and his workmen were making repairs though out this period, although they were done insufficiently and in an unworkmanship like manner, intended to harass the tenant and provoke a denial of access.

72. No hearing was ever conducted to substantiate the landlord's false allegations, and the DHCR sent inspectors on repeated occasions, resulting in an order, stating the the landlord's allegations could not be supported.

73. Sometime, just prior to January 19, 1993 (date of my protest letter), administrator Mulholland informed me by phone, that he had changed his mind, and was not going to restore the ironwork or any kind or a boundary line at the prior premises line, and only install safety glass and bars over the windows which were six feet in from the prior boundary of where the gate had been.

74. To protest, I sent the DHCR a series of letters.

75. Administrator Mulholland told me to contact New York City Housing Preservation And Development (hereinafter, HPD), Deputy inspector Ernest Tornincasa, (the agency who issued the

building code violation that removal of the gate was predicated on).

76. When I called Inspector Tornincasa, he did not want to discuss the issue of whether iron work was permissible, but only that he didn't want me living in my premises, and he said that "everything is illegal".

77. This was only because the landlord did not register my apartment as a residential space with the HPD, or get a new Certificate of Occupancy, as he was required to to, especially after the landlord was on notice that the space was no longer commercial after he lost in housing court and appeal of his eviction Holdover for me living in a commercial space.

78. The landlord's architect, lawrence Pinner, made misrepresentations to the DHCR that a gate was a legal impossibility, as a pretext to avoid having plans approved by the New York City Department Of Buildings, who would discover that the landlord was renting a commercial space that was not legalized with a new Certificate Of Occupancy.

79. The architect had a duty to come forward with this information before the DHCR and have the premises legalized and the premises properly registered with the HPD so that they would not avoid or harass me any further.

80. Lawrence Pinner infected the proceedings with fraud and misrepresentation for which the Administrative proceeding or state courts failed to offer a hearing, or to provide adequate an adequate remedy.

81. When I tried to discuss section 27-371, of the building code and section 25-221 of MR. Tornincasa's

very own agency's rules, **allowing gate doors**, he became even more angry, unreasonable and condemning.

82. He was only concerned about getting me out of my apartment.

83. When I told Inspector Tornincasa that the Housing court and the Appellate Division made a determination that I was a rent stabilized residential tenant, Mr. Tornincasa said , "I [he] don't care what a judge said".

84. Earlier and Later inspections by HPD inspectors are consistent with their unfamiliarity with construction law, or that they were not properly trained or evidence of their intentional hostility towards me living in the unlegalized space, that was the burden of the landlord to correct, not the tenant:

(1). My complaint to HPD concerning garbage accumulation in the basement was evaded (causing fumes and odors in a apartment, directly above).

(2). My complaints about lack of heat were evaded.

(3). My complainant that there is no ventilation in my
apartment was evaded.

85. Dated January 24, 1994, after ex parte, joint participation and involvement of HPD and the landlord's architect, of which I still do not fully know about, Administrator Mulholland said he was thinking of changing his mind, and that he, the landlord and the Department Of Housing Preservation and Development, were not going to restore my private and exclusive use to the sixty square feet of my apartment that I was partially

evicted from.

86. Dated February 9, 1994, Administrator Mulholland sent me a letter that he was **not** going to correct the partial eviction, and was only going to install window bars over the existing windows which were six feet in from were the prior gate acted as the boundary wall and entrance door to my premises.

87. These administrators knew or should have known that the housing statutes require the maintenance and habitability of the full and exclusive use by the tenant, to the entire premises, but they ignored these requirements and proceeded with vengeance and hostility, and in bad faith.

88. In letters dated February 11, 1994, and February 25, 1994, I asked that the proposed plan would not cure the dangerous conditions of homeless persons living in my apartment that were the result of the prior gate being removed, that I didn't want the newly proposed work to start yet, that I wanted to appeal the decision and that **I wanted to amend my administrative complaint**. because they were ignoring many of the other dangerous and illegal conditions.

89. When I called Administrator Mulholland on the phone and said that the plans were not fair, Administrator Mulholland said that "life isn't fair", that my "case was too complicated".

90. Administrator Mulholland sent me a letter, dated March 4, 1994 [falsely] stating that **there is no appeal to his decision** and if I obstruct repairs, that the case will be closed.

91. I filed a Petition For Administrative Review on the DHCR official forms, but DHCR Director Steven Cohen sent them back to me, stating that

they were "an inappropriate means to object to Mr. Mulholland's determination".

92. The DHCR and landlord, sensing my distress that the removal of the boards that were protecting me in lieu of the removed security gate - reinforcing the door and protecting the windows, tried to force the plans forward, and falsely stated in letters that I was denying access, when in fact I was not, and was only objecting to the plans and asking for a adjournment to seek advice from an architect, and to move out of my apartment for the summer so that I wouldn't have to live for another summer with no ventilation.

93. On May 16, 1994, I sent more photographs of the dirty and terrible conditions in the partial eviction, and photographs depicting how security ironwork was used in residential units in the surrounding community, that would be a reasonable cure and "adequate substitute" as the DHCR inspector ordered.

94. In the letters, I also stated that jurisdiction for approval of a gate was with the Department of Buildings and the Board of Standard's and Appeals, (not with HPD) and again, that I wanted to file an amended complaint.

95. The landlord filed an "Application for Modification Of Services", incorrectly stating that the gate had to be removed because of the HPD violation (when in fact the gate could have be modified, replaced with an "adequate substitute" - see DHCR inspector Levi's inspection report requiring this, or legal egress and ingress could have been provided by other means or elsewhere on the premises, as the apartment has another door leading

to the main residential building hallway or the landlord would supply a door at another place in the premises.

96. Dated, June 28, 1994,approximately a year and three months after the landlord illegally and unconstitutionally entered and destroyed a portion of my premises and carried away my household, personal and business belongings, the DHCR closed my case without restoring the premises.

97. The DHCR, as grounds for the closing of my case, are on false accusations that I was denying the landlord access to make the repairs. Repairs that were never sufficient or adequate, but moreover, were going to make the premises **more** dangerous by taking away the little protections of boards protecting the windows and flimsy wood framed door that were the focus of repeated break-in from the partial eviction that created a shelter for homeless, youth gangs etc.

98. HPD, the landlord and DHCR were well aware of the repeated attempted break-ins, as reported on page 1 of Administrator Mulholland's order of October 13, 1993, and by DHCR inspector levi, stating that, " Security gate removed from apt's storefront porch area, security hazard", and recording it as a grade 3, hazardous violation, to be cured in 30 days.

Administrator Mulholland acknowledged in his directive letter, that the glass window behind the board up windows were smashed when a youth gang tried to ram through the boards. I was woken from my sleep on repeated occasions by people trying to crash the flimsy wooden door down, or when they tried to crowbar it open, because it in now without

the protection of the prior gate, and the partial eviction created an enclosed area that attracts homeless people, drunks, youth gangs or criminals walking up Avenue B at late times of night, looking for a secluded door to pry open. I was assaulted by a drunken vagrant with a radio in this area., and on another occasion, attacked with a knife, by a group of youths, and on another occasion, viciously beaten up by another youth gang, when I tried to stop them from urinating in the partial eviction. The Partial eviction creates an area that attracts homeless seeking shelter, and crime and youth gang activity. It has been a constant souse of fear of crime and distress from the unhealthy conditions, for the last 10 years.

99. DHCR Administrator Mulholland and DHCR Director Cohen, both are public officials that know, or should have known that that the laws of habitability, nuisance,quiet enjoyment, personal security, the misdemeanor of illegal entry, were violated, but each sent me letters, and tried to make me think that there was no way to appeal their errant decision, and knowingly tried to obstruct my legal recourse to appeal, and judicial review.

100. On December 20, 1994, I filed petition number 134617/94, in the New York State Supreme Court, under Article 78, of the Civil Practice Law and Rules, for judicial review of Administrative action by the State Division Of Housing And Community Renewal, the agency charged with maintaining tenant services, and the City Department Of Housing Preservation And Development, the agency who issued the building code violation that the destruction of my apartment was predicated upon.

101. The landlord and his architect were also named in the lawsuit.
102. The petition for court review was predicated on violations of Amendments five and fourteen, of the United States Constitution, as well as nuisance, trespass, warranty of habitability and various other state law violations. As from DHCR inspector Levi's inspection report, that the removal of the security gate caused a hazardous violation which was to be corrected within 30 days, made this an emergency situation, ripe for immediate judicial review, regardless of the constitutional issues.
103. By order, dated February 14, 1995, New York County, Supreme Court Justice Joan Lobis, dismiss my petition, stating that the DHCR did not issue a final order.
104. The order ignored the emergency situation and the, 4th, 5th and 14th Amendment, United States Constitutional claims in my petition, for illegal entry, deseizing my apartment, and lack of notice or opportunity to object.
105. (this is one important point when it is obvious that New York does not provide an adequate state remedy for claims of constitutional violations and emergency conditions)
106. I appealed to the New York Supreme Court, Appellate Division scumbags, who affirmed the order, stating, "The motion court properly found the challenged administrative determination to be nonreviewable at this time since the agency has not yet determined petitioner's pending petition for administrative review." (all during this time, people were trying to break into my apartment, and the landlord and his tenants, the neighboring deli, piled

garbage up against my doors, and windows and basement in an attempt to make it so I couldn't possible live in the premises.

107. I appealed again, to New York's highest court - the New York Court Of Appeals, which was denied, June 5, 1997.

108. The State Courts didn't provide a forum for my United States Constitutional Claims. The bias state judges, to protect the state, ignored my constitutional claims and the emergency situation and created overburdening procedures, and obstructed and delayed my claims.

109. On March 23, 1998, I filed a civil rights action, case number 98 Civ (LBS) 2102, in United States District Court, for the Southern District of New York, which ended in an Order, dated December 14, 1999, by Judge Leonard Sand, stating that aside from mandamus, that **harassment** cases (he did not include my reduction in services complaint) do not provide for hearings, but moreover, that my case was beyond the three year statute of Limitations for a Civil Rights Case.

110. During the years 1999, 2000 and 2001, the landlord brought four New York City Civil Court eviction proceedings, (1 holdover eviction proceeding 095711/99), against me for refusing to sign a lease with rent increases, because they are not entitled until services are restored, and the landlord also brought three non-payment eviction proceedings against me,(case numbers 112733/99; 50592/00 and 82011/01).

111. Because of the primary jurisdiction of the DHCR, the courts refused to respond to my emergency claims that the windows and doors were

boarded up, and that I was living under extreme conditions - no heat - no ventilation - repeated assaults. (New York Courts did not provide an adequate remedy)

112. The Housing courts ordered HPD inspectors to my premises, where the inspectors in their report, lied further, stating that the windows and doors, etc. were in good working order.(my article 78 Courts, did not allow me to join or sue for the inspectors, for violating laws that they knew or should have know were violations of their own rules and State And City laws that they enforce - prejudicing my rights to have these laws enforced).

113. Approximately two months later, the DHCR issued their final order, (which is the basis of this lawsuit) dated February 8, 2000, granting me a $12 a month rent reduction, "for the elimination of the security gate service , **and the appurtenant area.**" (emphasis added)

114. Dated, Sep 14, 2000, the DHCR issued another order, restoring the rent to the level as if there was never a partial eviction.

115. The DHCR, severs and ignores my claims of a partial eviction and restores the full rent because the landlord made other repairs. (this was to hide the fact that the DHCR proceedings were taking a portion of my property w/o due process and nullifying my constitutional contract rights).

116. Just prior to that, on November 30, 1999, I filed case number 124062/99, pursuant to Article 78, in the New York State Supreme Court for the County of New York.

117. Because I didn't include the final agency order with my petition, the case was dismissed with leave

to refile.

118. I appealed to the Appellate Division who affirmed, and under the Saving Statute, CPLR 205(a), I recommenced case number 106421/02, within Six months of the Appellate Division order.

119. By order, Dated, November 19, 2002, Judge Eileen Bransten denied the petition, without granting a hearing or trial on the use and extent of the premises or the disputed issues, thus denying again judicial review of administrative action in state court.

120. By Notice of Appeal, dated, January 2, 2003, I commenced an appeal of the Order of Judge Bransten, which at the date of this compiaint, is currently pending.

121. It's fact that the **State has not conducted a hearing or trial at the Administrative Level.**

122. It's a fact that the **State has not conducted hearing or trial at the Judicial level.** 123. The state provided no **Constitutionally full or fair opportunity to litigate the use and extent of the premises,** or for me to have returned my personal and household belongings the the landlord took, or claims of 4th amendment violations.

124. Additionally, Article 78 is a totally inadequate forum to litigate 4th Amendment claims, particularly that the State Article 78 judges refused to allow me to join and litigate Constitutional Violations against the landlord as a state actor, and his architect, nor HPD.

125. FURTHER EVENTS

LANDLORD, IN 2001, APPROVES A BUILDING PERMIT THAT: (1) FURTHER EVICTS ME

FROM FURTHER SPACE OF MY APARTMENT (2) WILL CAUSE UNNECESSARY MAJOR RECONFIGURATION CONSTRUCTION THAT I WILL HAVE TO LIVE IN DURING THE CONSTRUCTION, CAUSING FURTHER MENTAL AND PHYSICAL DISTRESS: I WAS EXCLUDED FROM LITIGATING MY OBJECTIONS TO THE PERMIT BY UNREASONABLE NOTICE AND TIME LIMITATIONS IN THE ADMINISTRATIVE FORUM AND DENIED JUDICIAL REVIEW ON THAT BASIS.

126. In addition to these already intensely complicated transactions and events, the landlord, by letter, postmarked, December 11, 2001, made a written demanded for access to my apartment and included a New York City Department of Buildings, Work Permit, issued 12/06/01.

127. The Work Permit depicts the reconfiguration of walls, the bathroom and kitchen facilities and, moreover, the elimination of one of my apartment doors and the further elimination of a portion of my apartment.

128. This prejudicial plan was approved without my knowledge or participation, and eliminates another substantial portion of my apartment without Notice, or a full and fair opportunity for me to object.

129. Under policy and custom, New York housing laws did not provide me a pre deprivation notice and opportunity for me to participate in a reconfiguration of the apartment, even though it materially takes a portion of my apartment.

130. Under the Rules and Code of New York, I

would have to have appealed the Department Of Buildings permit to the Board of Standard and Appeals within 30 days to have state review.

131. The Building Permit was not sent directly to me, as it was done for the landlord, nor did I receive notice on how an adverse decision could be appealed, nor was I a party in the Building Permit approval, who would be on Notice of the pending case and what when on during the proceedings, to make full objection to those proceedings.

132. Not only do I as a tenant in occupation, stand in a similar position as the landlord in respect to the property rights of the premises, but I have a greater stake in the outcome because I am the one directly affected because I am the one living in the premises.

133. Because I didn't appeal to the Board of Standards And Appeals, the State article 78 Court also refused judicial review.

134. Under the State laws and policy, tenants do **not receive equal treatment or adequate remedy** or opportunity to raise their objections to a permit process if it will **take a portion of their leasehold**. (this a case of first impression, as there are no New York cases on this matter - generally apartments are vacant when the landlord applies to legalize or change the certificate of occupancy).

135. The reconfiguration of the apartment is unnecessary and the reconfiguration plans are only for the landlord's cost and convenience, as the apartment can be legalized just as it is, without subjecting me to the filth, danger and interference with possession as I will be living in the space while substantial reconfiguration of demolishing and rebuilding walls and repositioning the toilets, sinks

and kitchen facilities, is going on.

136. Additionally, under New York Law, policy and custom, I did not have an adequate post deprivation notice or opportunity to object to the structural changes which will take a part of my apartment, as a tenant not included in the Building department proceedings was not contemplated when the law was written, nor was I adequately informed on how I might appeal an adverse determination by the Department Of Buildings, nor did I have sufficient time from the mailing of the documents by an intermediate party(the landlord) to sufficiently challenge a order that deprives me of a portion of my apartment.

137. Once again, by exparte actions, the landlord has manipulated the system to deny me my rights to the full, exclusive and uninterrupted use and possession of the leasehold.

138. The landlord's plans are also ab initio illegal, as they do not provide for adequate ventilation and window space, and the proposed kitchen windows do not open onto a street of court, but into the enclosed partial eviction area, that the earlier actions involve.

139. **CAUSES OF ACTION**

I. New York City HPD DOES NOT PROVIDE A TENANT WITH ADEQUATE PRE-DEPRIVATION PROCEDURES, NOR IS NEW YORK CIVIL PRACTICE LAW AND RULES, ARTICLE 78 ADEQUATE STATE REMEDY TO ADDRESS PREDEPRIVATION.

140. Plaintiff realleges lines 1 through 138, as if fully set forth herein.

141. On or about April 10, 1993, I returned home from vacation to find that a portion of my apartment

was destroyed, causing a partial eviction and that the rest of the apartment was boarded over, causing a full forcible eviction from the rest of the premises.

142. My personal property was taken, including tables, chairs, a statute, business equipment, never to be seen again.

143. I did not receive Pre deprivation Notice or a opportunity to object to these actions.

144. From 1993, to this date, neither has the City or State administrative proceedings, not the State Judicial proceeding, provided a hearing. **Mathews v. Eldridge**, 424 U.S. 319.

145. It is a policy and custom, as well as under New York City and State law, that a tenant does not have an opportunity to Notice or an opportunity to object to Department of Housing Preservation And Development proceedings that may evict him from a portion of his leasehold.

see, Torres vs. New York City HPD, _____.

146. The illegal entry of the landlord entering under the cloak of acting pursuant the police power of a minor building code violation, taking my belongings without a pre deprivation hearing (Fuentes vs Shevin) , and causing a partial eviction by the demolition of part of the structure as taking of part of the leasehold, also without pre deprivation procedures, violates United States Constitutional Amendments, 1st Amendment right to petition the government; the 4th Amendment rights to privacy, to be left alone, and violations of Search and Seizure, ; 5th Amendment rights to be compensated for a temporary taking of property, and 14th Amendment rights to Substantive and Procedural Due Process and Equal Protection. (Soldal vs. Cook County).

147. The DHCR delayed for seven years before issuing a final order on February 8, 2000, in an effort to evade this case for administrative convenience, and for other further reasons which are in the exclusive knowledge of the DHCR, and the HPD who acted jointly and under the Statutory requisite of the, Emergency Tenant Protection Act of 1974. section 13. Cooperation with other governmental agencies. Soldal vs. Cook County, id.

148. **NEW YORK CITY AND NEW YORK STATE COURTS DID NOT PROVIDE A HEARING, TRIAL OR ADEQUATE POST DEPRIVATION REMEDIES ON ALLEGATIONS OF 4TH AMENDMENT VIOLATIONS:**

II. New York City and New York State has never provided a required post deprivation hearing OR AN ADEQUATE STATE REMEDY, pursuant to illegal and unconstitutional entry: GENERAL CONSTITUTIONAL CHALLENGE TO HPD'S LAW, TITLE 28 OF THE RULE AND CODE FOR THE CITY OF NEW YORK (hereinafter RCNY), section, 25-101, OWNER'S RIGHT TO ACCESS TO APARTMENTS OR ROOMS IN MULTIPLE DWELLINGS: NEW YORK CITY HOUSING MAINTENANCE CODE 27-2008.

149. Plaintiff realleges lines 1 through 147, as if fully set forth herein.

150. Nobody should have to come home and

unexpectedly find that their apartment was demolished by the landlord, under the pretext of responding to a minor building code violation. New York City inspectors and the City and State courts would have you believe that after the landlord has given seven days written notice, that he can just walk into a citizens apartment, and start making any repairs that he personally believes is appropriate - even in bad faith or with malice - and under the existing New York City and State Policy and procedures, the tenant will never receive a hearing or trial in court if he objects.

III. New York City and New York State has never provided a required Post Deprivation hearing regarding the taking of the tenant's personal belongings.

151. Plaintiff realleges lines 1 through 150, as if fully set forth herein.

152. Defendants cannot show where a required hearing was held during the administrative proceedings, or during the Article 78 proceedings.

153. The landlord, cloaked under the authority of the police power of responding to a HPD building code violation, converted the tenant's property without due process of law, and to this day, the tenant has still not had his property returned, or damages for it's unconstitutional and unlawful seizure, and detainer.

IV. New York City and New York State has never provided a required Post Deprivation hearing regarding the taking of a portion of the

Tenant's leasehold.

154. Plaintiff realleges lines 1 through 153, as if fully set forth herein.

155. Defendants cannot show where a required hearing was held during the administrative proceedings, or during the Article 78 proceedings.

156. New York law, policy and custom. didn't provide an adequate remedy at law, and without providing a hearing, did not provide for a full and fair opportunity to litigate.

157. Article 78 proceedings only offer a litigant mandamus or prohibition and are inadequate to address allegations of violations of the 4th Amendment to the United States Constitution.

158. Accordingly, Article 78, especially that a required hearing was never held during the administrative proceedings or by the Article 78 court , do not provide an adequate remedy to litigate 4th Amendment issues, and does not provide for damages, and does not preclude issues which the litigant didn't have a full and fair opportunity to litigate.

V. BIAS OF NEW YORK JUDGES IGNORED AND FAILED TO ADDRESS CONSTITUTIONAL ISSUES, FAILING TO GIVE A FULL AND FAIR OPPORTUNITY TO LITIGATE ISSUES: Judges used administrative and ministerial duties to obstruct.

159. Plaintiff realleges lines 1 through 158 , as if fully set forth herein.

160. In my first Article 78 proceeding, case number, 134617/94, I raised Constitutional violations under

the 5th and 14th Amendments, of the landlord's illegal and unconstitutional entry, under a HPD building code violation and deseizing of my apartment, without Notice or an opportunity to object.

161. Dated, February 14, **1995**, New York County Supreme Court Judge, Joan Lobis dismissed the case, stating the there was no Final Agency Order.

162, This Supreme Court order goes to show that the New York Courts were going to Unconstitutional Delay emergency judicial review and as a New York State POLICY, that the New York Court were **not going to provide for Constitutionally adequate procedure.**

163. As a policy and custom, as well as the well know adage, that "you can't sue city hall", the New York judges were going to protect their own administration, and flawed procedure and the Unconstitutional HPD law, 28 RCNY § 25-101, and § 27-2008, of the N.Y. C. Housing Maintenace Code, whereby allowing the landlord to enter, by gov. authority, a tenant's premises, at any time without Notice or an Opportunity to object, in violation of the 4th Amendment to the United States Constitution, right to privacy and to be left alone, and whereby the city and state does not provide adequate procedure, or full and fair opportunity to challenge.

164. As held by Judge Smith, in this Circuit, that the tenant is to be provided fair procedure in the first instance - during the administrative proceedings, and that an Article 78 is inadequate to correct this violation. Escalera v. New York City Housing Authority, 425 F2d 853.

165. Article 78 proceedings deny me the right to a

jury trial.

Additionally, Article 78 proceedings, as summary proceedings, are inadequate to address my pre-deprivation claims and are inadequate to address my 4th Amendment claims.

166. Accordingly, my Constitutional issues were never given a full and fair opportunity to be litigated, and do not constitute res judicata or collateral estoppel.

VI. JUDICIAL MISCONDUCT DENYING A FULL AND FAIR OPPORTUNITY TO LITIGATE AND TO PETITION THE GOVERNMENT FOR A REDRESS OF GRIEVANCES.

167. Plaintiff realleges lines 1 through 166, as if fully set forth herein.

168. In the second Article 78, the HPD attorney, Mark Tyler, sent a letter to Judge Huff stating that the area in question was not my premises but part of the sidewalk.

169. I made a motion to oppose the prejudicial matter illegally sent in a letter sent to the judge, as the HPD attorney knows that new matter should only be addressed by motion.

170. Additionally, such matter is a dispute of fact, requiring a hearing.

171, Judge Carol Huff, **back dated** an order, dismissing my case and to deny me Due Process, a trial and a redress of my grievances against the HPD, DHCR and the landlord and his architect, who obstructed legalization and obstructed correction of dangerous emergency conditions.

172. When I made a motion for reargument and to clarify Judge Huff's order, she granted me leave to

refile.

173. Backdating her order to dismiss a case that she feels reluctant to litigate, making me have to prejudicially refile and pay the money and time to do so, when the court should have addressed the papers correctly in the first instance, denies me Due Process and obstructs my right to redress of grievances.

174. Moreover, upon my information and belief, the action of Judge Huff, falsifying papers by backdating her order is a ministrative fraud that is not judicial in nature, and subjects the judge to acting outside of her judicial powers.

175. This judicial abuse was further, after I refiled my case, and was assigned, New York County Supreme Court judge, Eileen Bransten.

176. After submitting my Article 78 Petition, I responded to motions to dismiss by the HPD and the landlord.

177. After submitting opposition papers in the Motion Support room of the New York County Court House, I ask the Motion support clerk taking my papers if a hearing would be held. The Clerk said that the Court would notify me if the judge wants a hearing.

178. A few weeks later, on July 22, 2002, I called Judge Bransten's chambers to inquire if oral argument was scheduled. The judge's clerk said that there was no hearing scheduled and that the judge would notify me if she wanted a hearing.

179. On August 13, 2002, after coming home from a three day vacation in Belmar, New Jersey, I heard on my telephone answering machine, a message from the HPD attorney, that I was supposed to be in Judge Bransten's courtroom.

180. Upon information and belief, Judge Bransten held an inappropriate ex parte hearing with my adversaries. This was illegal and violated my right to Notice and full and fair procedures.

181. Oral argument was held a week later, on August 20, 2002, at which Judge Bransten refused to present my argument.

182. Dated, November 19, 2002, Judge Bransten denied my petition for judicial review, failing to provide a hearing on constitutional issues and on disputed questions of fact, and failing to address the constitutional violations. NEW YORK STATE PROCEDURE FAILED TO OFFER ADEQUATE PROCEDURE OR A FULL AND FAIR OPPORTUNITY TO LITIGATE CONSTITUTIONAL VIOLATIONS.

183. Judge Bransten also indulged in unwarranted and prejudicial ex parte communications with my opponents.

VII. ARTICLE 78 PROCEEDINGS WERE ONLY AVAILABLE AGAINST A BODY OR OFFICER AND ACCORDINGLY, WERE NOT MADE AVAILABLE AGAINST THE LANDLORD, ACTING UNDER COLOR OF LAW, WHO ILLEGALLY ENTERED AND DESTROYED A PORTION OF THE APARTMENT AND CARRIED AWAY THE TENANT'S PROPERTY WITHOUT DUE PROCESS OF LAW .

184. Plaintiff realleges lines 1 through 183, as if fully set forth herein.

185. In the second Article 78, that was

unnecessarily brought, as these issues should have been adjudicated in the first, Judge Huff dismissed the landlord because he was not a government body or officer, and accordingly, the Article 78 proceeding did not provide an adequate state remedy for litigating 4th Amendment claims against the landlord.

186. As the landlord had a property interest in the article 78 proceedings, I had a reasonable expectation that he would be included in the proceedings, as case law supports this position.

187. Accordingly, it wasn't until the order of Supreme Court Huff, dated, May1, 2000 dismissing the landlord, did I know that the New York Court would not offer an adequate state remedy against the landlord.

188. Furthermore, the DHCR secured jurisdiction over the landlord tenant dispute in the administrative proceedings, and accordingly, the landlord was a joint participant leading to the DHCR final order.

VIII. ARTICLE 78 PROCEEDINGS WERE UNAVAILABLE TO LITIGATE CLAIMS, OR PROVIDE A HEARING AGAINST THE NEW YORK CITY DEPARTMENT OF HOUSING AND COMMUNITY RENEWAL, WHO BY STATUTORY MANDATE, AND BY PARTICIPATING IN THE DHCR PROCEEDINGS, WAS A JOINT ACTOR, DIRECTLY AFFECTING THE DHCR JUDGMENT.

189. Plaintiff realleges lines 1 through 188, as if fully set forth herein.

190. Through procedures which are unknown to me, but entirely within the knowledge of the defendants, Deputy Chief Inspector Ernest Tornincasa of the HPD, became the controlling person, as to determine whether an adequate substitute gate could be restored.

191. There is nothing in the record of Mr. Tornincasa making any direct statements

IX. VIOLATION OF PERSONAL SECURITY

192. Plaintiff realleges lines 1 through 191, as if fully set forth herein.

193. Regardless of how the State Court ruled regarding the property rights of the litigants, Plaintiff has a constitutional right to be free from danger.

194. The Defendants, who acted jointly, knew or should have know that the illegal premises did not conform to the minimum standards of the building laws, with the windows and doors boarded up for ten years, and a continuing dangerous nuisance of homeless people, youth gangs, etc., blocking the entrance of the tenant's home and subjecting him to a prolonged exposure to crime and the unhealthy conditions of the homeless urinating and defecating affecting the conditions in his home.

195. The DHCR, HPD, the landlord and his architect, knew or should have known that these conditions were violating the statutory scheme of the Rent Stabilization Laws and the Emergency Protection Act, the New York City Anti Eviction Law, the State Multiple Dwelling Law, and New York State Real Property Law, § 235-b, all of whose purpose was to assure that the tenant lived in

habitable condition.

196. Even after the DHCR inspectors visited the premises on numerous occasions, and could not conclude that the tenant was not denying access, and that the landlord did have access, and did come and make repair, unobstructed during all this time - the tenant has lived with the windows and doors boarded up

X. VIOLATION OF EQUAL PROTECTION: ADMINISTRATIVE CONVENIENCE.

197. Plaintiff realleges line 1 through line 196, as if fully set forth herein.

198. John Mulholland, and his supervisor, Steven Cohen, had a duty to fully and fairly adjudicate my claims.

199. As my claims are predicated on an unconstitutional entry and demolition of a portion of my apartment under the pretext of responding to a building code violation, these administrators had a mandatory duty to maintain my premises in full and habitable use, and claims of refusing to do so for reasons of administrative convenience, violate my equal protection rights regarding constitutional issues, as well as issues litigated by the agencies in bad faith and infected by the fraud, misrepresentation and concealment of the landlord's architect.

XI. VIOLATION OF EQUAL PROTECTION: DISPARATE TREATMENT.

200. Plaintiff realleges lines 1 through 199, as if fully set forth herein.

201. I filed my complaint with the DHCR, and the DHCR took all my rights away.

202. I stand in the similar position of a tenant who would have otherwise been in housing court or the State Supreme Court, and the DHCR treated me differently, by taking all my rights away, that I would otherwise have had in Contract, tort, Common Law, as well as under the statutory scheme of the Rent Stabilization Law of 1969, the Emergency Tenant Protection Act of 1974, New York State Real Property Law, §235-b, the Warranty of Habitability; the State Multiple Dwelling Law, §§ 78 Repairs, and Article 8, requiring the premises to have a certificate of occupancy, to prevent the landlord from making dangerous or illegal repairs and alterations of the apartment, without PERMIT approval of plans from the New York City Department of Buildings.

203. Under Section 13, of the New York Emergency Protection Act of 1974, the DHCR is to have cooperation from all agencies, including the HPD, which makes their joinder mandatory, but also the New York City Department of Buildings, who was required to be contacted, and has EXCLUSIVE JURISDICTION to approve building alteration and permit approval by the Architect for approval of the gate that the DHCR inspector Levi, required to be restored within 30 days, back in 1993.

204. The architect, knowing that he and the landlord would be caught with fines and the mandatory legalization of the premises to collect rent, knowingly injected misrepresentation, fraud and concealment into the proceedings, making architect Pinner and mandatory party and joint participant to the Administrative proceedings, aside from any liability that he would otherwise have in a private action.

XII. UNDUE AND UNREASONABLE DELAY: by DHCR and State Courts.

205. Plaintiff realleges lines 1 through 204, as if fully set forth herein.

206. Dated, October 27, 1993, DHCR inspector Levi issued an order requiring the landlord to restore the prior illegally removed Storefront Scissors Gate with an "Adequate Substitute", within 30 days, and that the removal of the gate created a "grade 3, Hazardous Security Hazard"

207. New where in the administrative record is there a showing that a gate was legally impermissible. In 2001, when the landlord had his Building Permit approved, a short, 3 foot high gate was approved after the DHCR determined that it could not be. (sill a 3 foot high gate is not an adequate substitute, as it would not restore the same level of security, or insure the sole and exclusive use to the tenant, when it could be easily climbed over, and I wouldn't be able to keep my household belongings in that area, as I once did.

208. Now it is 10 years latter, and I had to endure the last 10 years of repeated break-ins and three assaults.

209. Regardless of any priority as to the extent of the premises, the public officials involved in this case, created and maintained, as it has existed for the last 10 years, a security hazard that caused sever emotional pain and suffering from the fear of repeated break-in, of homeless people living in the partial eviction, of being repeatedly assaulted by people in this area, and the dangerous conditions of restricted ventilation, affected by the smell of urine,

feces, garbage, and from the odors of storage and machinery in the basement.

XIII. PERMIT PROCESS LACKS NOTICE TO THE TENANT, AND AN OPPORTUNITY TO LITIGATE UNDER THE 14 AMENDMENT OF THE UNITED STATES, PROCEDURAL DUE PROCESS.

210. Plaintiff realleges lines 1 through 209, as if fully set forth herein.

211. Plaintiff did not receive notice that a permit was being approved that would affect the extent of his leasehold, and had no opportunity to participate or raise his objections in the first instance (during the administrative process itself, not upon secondary review of an appeal).

212. Accordingly, the appropriateness of an appeal is questionable as the tenant did not know what went on during the course of the proceedings.

XIV. ILLEGAL PERMIT APPROVAL DOES NOT FURTHER A LEGITIMATE PURPOSE UNDER THE 14 AMENDMENT OF THE UNITED STATES, SUBSTANTIVE DUE PROCESS.

213. Plaintiff realleges lines 1 through 212, as if fully set forth herein.

214. The purpose of the tenant protect laws and the housing regulatory scheme is to ensure that tenants have save and habitable living conditions.

215. FIRSTLY, the plans violate the New York State Multiple Dwelling Law, and Housing Maintenance Code, whereby rooms may not go back further than 30 feet without a window or mechanical ventilation.

216. The landlord was cited by this violation in

1984, but still had his architect go forward and illegally approve a plan that not only violates the past citation, but goes on to remove the rear wall of the main room, and make the room go back even further, essentially making the main living/sleeping room essentially without a window, as well as the existing windows, light and ventilation, blocked by kitchen appliances that do not have a window that opens onto a street or court, but into the enclosed porch that is the subject of the partial eviction portion of the case.

217. That the Department Of Buildings would approve an illegal permit is questionable, and that discovery and disclosure is needed to look into self-certification plans of the landlord's architect.

218. This is consistent with the landlord's 18 years of obstructing meaningful, legally sufficient and adequate repairs. A careful review of the evidence throughout the DHCR and the new Permit Approval, shows that the landlord has never made a good faith attempt at properly legalizing or bringing the premises into anything remotely habitable, but uses insufficient repairs to infuriate and harass the tenant, and keep the premises if disrepair and under dangerous conditions.

219. SECONDLY, Subjecting the tenant to live in the apartment while major construction of tearing down walls and rebuilding walls and repositioning and rebuilding the kitchen, bathroom and windows, subjects the tenant to undue and unnecessary hardship and dangerous conditions, especially if the the apartment can be legalized in a more unobstructive way.

220. This is outrageously dangerous, arbitrary and

capricious action by joint action by the administrative DOB agency and the landlord and his architect, not only prejudicing the tenant's rights to the full use and extent of the premises, but exposing the tenant physical harm.

XV. EQUAL PROTECTION VIOLATION: PERMIT PROCESS LACKS AN OPPORTUNITY TO LITIGATE UNDER THE 14 AMENDMENT OF THE UNITED STATES CONSTITUTION, AS THE TENANT IN OCCUPANCY STANDS IN A SIMILAR POSITION AS THE LANDLORD IN RESPECT TO THE FULL USE AND EXTENT OF THE PREMISES.

221. Plaintiff realleges lines 1 through 220, as if fully set forth herein.

222. The New York City Rent Stabilized Law of 1969, the Rent Stabilization Code, as well as the Emergency Tenant Protection Act of 1974, establishes a **property right** for the tenant in the **Sole and Exclusive Use and Occupation** of the premises for the Term of the Lease, as well as the option to renew the lease with a continuation of the same services, including, "Space". 9 NYCRR § 2520(r); RSL § 26-511(c)(4)

223. Accordingly, a building permit approval, which the tenant did not participate in, nor aggress to, which plans to reduce the size of his leasehold, violates the Equal Protection Clause of the United States Constitution.

224. In respect to the Extent and Use of the apartment, the Tenant stands in the same position as the landlord, if not with a higher standing, as the tenant is the one who must be living in the space.

225. State and city laws, procedure and policy that

don't give the tenant a reasonable opportunity to object to combined landlord and government action which will directly and adversely affect him, violate the Equal Protection Clause of the 14 Amendment to the United States Constitution.

226. The Tenant did not get an opportunity to represent his property interests in the first instance, before the New York City Department of Buildings, nor did the New York City Department of Buildings send a Copy of the Permit to the Tenant affected thereby.

227. Nor did the Department of Buildings or the landlord sent a notice to the tenant on how to object to a decision that may adversely affect his rights.

228. What went on during the Permit Approval process is only within the knowledge of the defendants, and an appeal, (as opposed to a direct court challenge) does not give the tenant an equal opportunity to litigate an appeal when he doesn't know what went on during those proceedings - an appeal does not allow for disclosure of discovery.

229. The tenant stands in an equal position, and is similarly situated as the landlord, in respect to the property rights of the full use and extent of the apartment premises.

230. Under New York Administrative procedure and Article 78 state court procedure and policy, the tenant was **NEVER GIVEN A HEARING, NOR A FULL AND FAIR OPPORTUNITY TO LITIGATE, nor an opportunity to litigate constitutional violations against the landlord for his entry and taking of my personal belongings and a portion of the premises under the cloak of government power of responding to a building**

code violation.

XVI. VIOLATION OF 18 USCA §§ 1961 THROUGH 1968, WHEREBY JUDGES CONSPIRED WITH BUILDING INSPECTORS, AND OTHERS, CAUSE AN UNCONSTITUTIONAL ENTRY INTO HIS HOME UNDER NEW YORK LAW AND THE 4th Amendment OF THE UNITED STATES CONSTITUTION, TO DEPRIVE A TENANT OF HIS PERSONAL PROPERTY AND A PORTION OF HIS LEASEHOLD RIGHTS, HIS RIGHT TO PETITION THE GOVERNMENT, AND HIS DUE PROCESS RIGHTS.

231. Plaintiff realleges lines 1 through 230, as if fully set forth herein.

232. Instead of including it in a motion to dismiss my case, HPD attorney, sent a letter to Supreme Court Judge Carol Huff, in my Article 78, containing prejudicial matter.

233. When I learned of the letter, made a motion to the court to oppose the prejudicial material in the the letter.

234. To my information and belief, Supreme Court Judge Carol Huff, back dated an order, dismissing my case, **back dated** to the day just before I made motion to address the HPD letter.

235. Conduct of altering and falsifying court documents and arranging ex parte communications is a pattern of corruption, beyond the judicial function and duties of the judges.

236. Furthermore, the Rules of the Chief Judge, pursuant to Title 22 of the New York Codes Rules Regulations §§ 100.1, and 101.2 and 100.3, ALSO,

provides substantive standards by which a jury my judge the actions of these judges.

237. The actions of these judges, of back dating orders and scheduling and entertaining ex parte contacts with my opponents, are these judges acting outside of their judicial function, depriving me of my Due Process rights to full and fair procedures, under the 14 Amendment to the United States and my rights, provided to me under the New York Civil Practice Law And Rules, including but not limited to, full and fair motion practice, full and fair disclosure and my right to Trial.

238. These are unlawful and underhanded tactics used by the State judges, and are not matters on the record,by which an appeal to a higher appeals court could appropriately address.

XVII. REGULATORY TAKING.

239. Plaintiff realleges lines 1 through 238, as if fully set forth herein.

240. Plaintiff appeared before the state courts to have his leasehold property restored and the State Courts refused. Collateral estoppel and Res Judicata is inapporpritate where the extent and use of property is a question of fact, and no hear or trial was ever held, at the administrative of judicial level.

241. Article 78 and DHCR proceedings are inadequate for adjucicating taking claims in the first instance, or claims under the United State Contract Clauses, or 4th or 5th Amendment claims.

242. Even under a temporary regulatory taking, the lessee is entitled to damages during the duration when the use or possession of the property was materially interfered with.

WHEREFORE: the plaintiff prays:

243.. On the **first cause** of action for lack of pre-deprivation procedure, that the court declare the rights and the legal relations of the parties to the subject matter here in controversy, and that the court declare New York City Department Of Housing Preservation And Development law, Title 28 RCNY section 25-101, in violation of the 4th and 14th Amendments of the United States, and that the court award, nominal, compensatory and punitive damages.

244.. On the **second cause** of action for lack of adequate post deprivation procedure, that the court declare the rights and the legal relations of the parties to the subject matter here in controversy, and that the court declare the actions of the landlord in violation of the 1st, 4th and 14th Amendments of the United States, enjoin further violations, and that the court award nominal, compensatory and punitive damages.

245. On the **third cause** of action for lack of post deprivation procedure, and the return of my personal property, that the court declare the rights and the legal relations of the parties to the subject matter here in controversy, and that the court declare the landlord acting under color of law, in violation of the 4th and 14th Amendments of the United States, and that the court award compensatory and punitive damages.

246. On the **forth cause** of action for lack of post

deprivation procedure, for the taking a portion of my leasehold, that the court declare the rights and the legal relations of the parties to the subject matter here in controversy, and that the court grant equitable and injunctive relief to restore the full use, and that the court award compensatory and punitive damages.

247. On the **fifth cause** of action for lack of post deprivation procedure by the state court judges, that the court declare the rights and the legal relations of the parties to the subject matter here in controversy, and that the court declare state judge withholding constitutionally required judicial review, in violation of the 1st, and 14th Amendments of the United States.

248. On the **sixth cause** of action for lack of post deprivation procedure because of **judicial misconduct**, in conjunction with ex parte meetings with opponents, back dating documents, and linked with misdemeanor of the landlord's criminal entry under the New York City Anti-Eviction Law, that the court declare the rights and the legal relations of the parties to the subject matter here in controversy, grant disclosure and discovery into court administrative procedures that are exclusively within the knowledge of the judges, judges staff and court personnel, and that the State Court judges actions were in violation of the 1st, and 14th Amendments of the United States Constitution and 18 USCA §§ 1961 through 1968.

249. On the **seventh cause** of action for **lack of**

adequate post deprivation procedure by a Article 78 court **not joining the landlord** who was a principle actor under police power of HPD law and a building code violation, as a necessary party, that the court declare the rights and the legal relations of the parties to the Constitutional matters here in controversy, and that the court provide a trial and adequate due process, equitable and injunctive relief, in conformity with the 1st, 4th and 14th Amendments of the United States.

250. On the **eighth cause** of action for **lack of adequate post deprivation procedure** because the State court didn't provide due process or a hearing for my claims against HPD as a **joint participant,** that the court declare the rights and the legal relations of the parties to the subject matter here in controversy, and that the court provide due process in conformance with the 1st, 4th and 14th Amendments of the United States.

251. On the **ninth cause** of action for **constitutional violations for personal security,** that the court declare the rights and the legal relations of the parties to the subject matter here in controversy, and that the court declare state action in violation of the 1st, 4th and 14th Amendments of the United States, and that the court provide a hearing and Due Process, including equitable and injunctive relief.

252. On the **tenth cause** of action for lack of adequate state remedy and violation of **Equal Protection**, because of DHCR failed to restore the

premises and remedy dangerous conditions because of administrative convenience, that the court declare the rights and the legal relations of the parties to the subject matter here in controversy, and that the court declare the actions of the DHCR in violation of the 1st, 4th and 14th Amendments of the United States, and that the court provide a hearing and due process, and injunctive and equitable relief.

253. On the eleventh cause of action for lack of adequate post deprivation procedure violating the Equal Protection Clause because of disparate treatment by DHCR inaction to tenants similarly situated in court proceedings, that the court declare the rights and the legal obligations of the DHCR, including the DHCR obligation to hold hearings when a tenant is deprived of a substantial right, including to loss of a portion of his leasehold.

254. On the twelfth cause of action for undue and unreasonable delay by the DHCR, that the court declare the rights and the legal obligations of the parties, and grant a trial, hearing and Due process, as to the use and extent of the premises, and the habitable conditions, or in the alternative, order the DHCR to provide for prompt and Constitutionally adequate hearings. Plaintiff also asks for nominal, compensatory and, or punitive damages, and for further relief that the court deems fair and proper.

255. On the thirteenth case of action for the violation of EQUAL PROTECTION, of the tenants rights in the approval of the permit process, this court declare the rights and legal obligation of the

parties, will grant a hearing and Due Process, on the use and extent of the premises, or in the alternative, remand to the New York City Department of Buildings, so as I may represent my leasehold rights in the administrative process, and grant nominal, compensatory and, or punitive damages, and other, further relief that the court deems just and fair.

256. On the Fourteenth cause of action for violation of SUBSTANTIVE DUE PROCESS, under the 14th Amendment of the U.S. Constitution, and lack of adequate state remedy, that the court declare the rights and the legal relations of the parties to the subject matter here in controversy, and that the court provide a hearing and due process, or in the alternative, remand to the New York City Department of Building, so that I can represent my rights, and for further injunctive and equitable relief as the court deems just and fair, and for nominal, compensatory and punitive damages.

257. On the **fifteenth cause** of action for violation of the **EQUAL PROTECTION**, under the 14 Amendment to the United States Constitution, that the court declare the rights and the legal relations of the parties to the subject matter here in controversy, and that the court declare the actions of the landlord in violation of the, 1st, 4th, 5th, and 14th Amendments of the United States, grant a hearing, or in the alternative, remand, and enjoin further violations and that the court award, nominal, compensatory and punitive damages.

258. On the **sixteenth cause** of action for violation of the **RICO STATUTE**, under 18 U.S.C.A §§ 1961

through 1968, that the court declare the rights and the legal relations of the parties to the subject matter here in controversy, and that the court declare the ex parte meeting of the judges and DHCR and HPD, without Notice, knowledge, consent, and in violation of the, 1st Amendment Right to Petition the Government, and the Due Process, 14th Amendment of the United States. Plaintiff seeks discovery, disclosure and a hearing, and enjoin further violations and that the court award, nominal, compensatory and punitive damages.

259. On the **seventeenth cause** of action for a **REGULATORY TAKING** , that the court declare the rights and the legal relations of the parties to the subject matter here in controversy, and that the court declare the actions of the landlord in violation of the 1st, 4th, 5th and 14th Amendments of the United States, restore the premises to the tenant, enjoin further violations and that the court award, nominal, compensatory and punitive damages.

260. PLAINTIFF FILES THIS COMPLAINT TO PRESERVE HIS RIGHTS, AND TO TOLL THE THREE YEAR CIVIL RIGHTS STATUTE OF LIMITATIONS, EXPIRING THREE YEARS OF THE DATE OF THE DIVISION OF HOUSING AND COMMUNITY RENEWAL ORDER, DATED FEBRUARY 8, 2000, WHICH AWARDED ME $12 FOR THE "LOSS OF APPURTENANT SPACE".

261. SIMPLY STATED, RES JUDICATA AND COLLATERAL ESTOPPEL IS NOT APPROPRIATE WHEN THE STATE COURTS AND STATE

ADMINISTRATIVE PROCEEDINGS NEVER HELD A HEARING.

262. THIS IS A SYSTEMIC POLICY BY NEW YORK TO PRECLUDE TENANTS FROM OBJECTING TO BUILDING CODE VIOLATIONS, EVEN IF IT DEPRIVES THEM OF A PORTION OF THEIR LEASEHOLD.

263. PLAINTIFF REQUESTS THAT THIS COURT ABSTAIN, WHILE RETAINING JURISDICTION DURING PENDING STATE COURT APPEALS, INVOLVING MANY OF THE SAME ISSUES AND MUCH OF THE SAME FACTS, ARE CURRENTLY PENDING IN NEW YORK STATE SUPREME COURT, APPELLATE DIVISION. 1ST DEPARTMENT. THE DEFENDANTS ARE NOT PREJUDICED BY THIS DELAY.

264. RESOLUTION OF THE STATE COURT PROCEEDINGS MAY RESOLVE SOME OR ALL OF THE ISSUES HEREIN, AND ACCORDINGLY, ABSTENTION IS APPROPRIATE.

Dated: New York, New York
February, 7, 2003.

Stephen Dibbs, plaintiff pro-se
P.O. Box 2148
New York, N.Y. 10009
(212) 674-5559

6 A.D.3D 232; 774 NYS2D 327
04 N.Y. APP. DIV. LEXIS 4071

SUPREME COURT FOR THE STATE OF NEW YORK; COUNTY OF NEW YORK
Judges: Andrias,JP, Ellerin, lerner, Gonzales JJ

----------x

STEPHEN DIBBBS,

Appellant,

v

JOHN MULHOLLAND, et al

Respondents.

----------x

OPINION:

Order and judgment (one paper), supreme court, New York County (Eileen Bransten,J.) enterd December 3, 2002, which denied the petition for injunctive relief from actions taken by the Division of Housing and Community Renewal (DHCR) and the Department of Buildings, and dismissed the proceedings, unanimously affirmed, with costs.

This Court has previously found that DHCR's determination to close petitioner's harassment complaint was not an abuse of discretion, and that a proceeding challenging its determination of February 8, 2000, which granted detendant landlord's application for a service and rent reduction, was time-barred Dibbs v Mulholland (292 A.D.2d 164, 738 NYS2d 203(2002), lv denied 98 N.Y.2d 757, 781 N.E.2d 910, 751 N.Y.S.2d 845 (2002). supreme Court properly declined to entertain petitioner's claims against the Departmenr of Building on the ground that he had failed to exhaust his administrative remedies (Matter of Perrotta v City of New York, 107

AD2d 320, 486 NYS2d 941(1985, affd 66 NY2d 859, 489 N.E.2d 255, 498 N.Y.S.2d 368 (1985).

we have considered petitioner's remaining arguments and find them unavailing.

Concur, Andrias,J.P., Ellerin, Lerner, Gonzalez, JJ.

Dated: March 5, 2002